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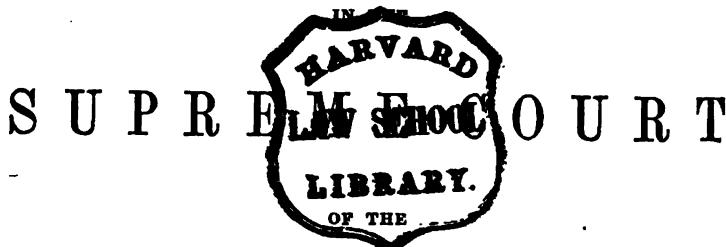
VERMONT, SUPREME SOCIETY
REPORTS

19

OF

CASES

ARGUED AND DETERMINED



STATE OF VERMONT.

VOLUME XIX.

NEW SERIES,
BY PETER T. WASHBURN,
Counsellor at Law.

VOL. IV.

WOODSTOCK:
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Entered according to Act of Congress, in the year 1848, by
PETER T. WASHBURN,
in the Clerk's Office of the District Court for the District of Vermont.

JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. STEPHEN ROYCE, CHIEF JUDGE.*
HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. CHARLES DAVIS, } ASSISTANT JUDGES.

*In place of Hon. CHARLES K. WILLIAMS, who declined a re-election.

ERRATA.

- Page 96, line 22 from top, for *statute* read *case*.
" 127, line 17 from top, for *finished* read *furnished*.
" 270, line 17 from top, for *home* read *same*.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA,

MARCH TERM, 1845.

[Continued from Vol. 17, page 578.]

PRESIDENT,

Hon. STEPHEN ROYCE,
Hon. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
Hon. WILLIAM HEBARD, }

JOHN HYNDMAN v. JOHN HYNDMAN.

IN CHANCERY.

Every case should be *fully heard* in the court of chancery;—but the chancellor may, in his discretion, make a decree *pro forma*, with a view of saving needless expense to the parties, in case the supreme court should be of opinion the orator cannot prevail.*

A contract between a mortgagee and mortgagor, in reference to the purchase by the mortgagee of the equity of redemption, will not be positively disregarded in a court of equity; but such contracts are viewed suspiciously, and the conduct of the mortgagee will be watched very narrowly.

In this case the orator, being indebted to the defendant, executed to him an absolute deed of his farm, taking back a writing of defeasance. The orator

*See *Stafford v. Ballou et al.*, 17 Vt. 329.

Hyndman *v.* Hyndman.

received from the defendant farther advances, until the sum due amounted to about \$600. The parties then agreed, that the defendant should have the farm for \$800; and the defendant gave his note to the orator for the difference between that sum and the amount due upon the mortgage, and the orator surrendered his writing of defeasance ;—but it was agreed verbally between them, that the defendant should sell the farm and the orator should have what he received over \$800, after paying defendant for his time and trouble. And it was held, that the contract must, in equity, be still considered as a mortgage, with a power of sale in the mortgagee, and that the orator should be allowed to redeem the premises upon a bill brought for that purpose.

And the orator was allowed to redeem, notwithstanding the defendant had, in pursuance of his power of sale, caused the premises to be sold at auction and became *himself* the purchaser.

APPEAL from the court of chancery. The facts, as they appeared from the bill and answer and the testimony taken, were substantially as follows.

In 1832 the orator, being indebted to the defendant and William Hyndman, executed to them an absolute deed of his farm in Barnet and received back a writing of defeasance. The orator received farther advances from time to time, until 1836, when the parties reckoned together the amount due and found it to be \$608,69, and then agreed, that the defendant and William Hyndman should have the farm, free from the orator's equity of redemption, at eight hundred dollars; and the defendant accordingly surrendered to the orator the notes due from him and executed to the orator a note for \$191,31, and the orator surrendered his writing of defeasance ;—but it was at the same time verbally agreed between them, that the defendant should sell the farm and the orator should have what was received therefor, above the sum of eight hundred dollars, after paying the defendant for his time and trouble in the business. The orator continued to reside on the premises until the commencement of this suit; and the defendant, subsequent to 1836, leased the premises from year to year to different persons and received the rent, until March 30, 1840, when the parties executed an indenture, in which it was recited, that the defendant and William Hyndman had paid to the orator \$869,80, as of the date of March 11, 1840, in consideration of which they held a warrantee deed of the premises in question; and it was agreed, that the orator should have the use

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of the farm for one year for the rent of \$78,09,—that if he paid the rent and the sum of \$869,80 before March 11, 1841, he should have a deed of the farm,—but that, if he did not make payment, the defendant should sell the farm at auction on the first day of April, 1841, and should pay to the orator what was received for the farm, above those sums, after paying defendant for his time and trouble. The defendant caused the farm to be sold at auction in 1841 and became the purchaser himself at \$1001,00, and offered to pay to the orator the surplus above the sums specified in the indenture; but the orator would not receive it. Testimony was given tending to prove that the orator was poor, and that the farm was worth \$1100, or \$1200. William Hyndman conveyed his interest in the premises to the defendant before the commencement of this suit.

The orator prayed, that an account might be taken of the amount justly due to the defendant, and of the rents and profits of the premises received by the defendant, and that the orator might be permitted to redeem the premises.

The court of chancery,—**REDFIELD**, Ch.,—dismissed the bill with cost;—from which decree the orator appealed.

A. Underwood, for orator, contended, that the transaction between the parties created originally a mortgage upon the premises, and that the relation between them was in no respect subsequently altered, except that the defendant, by the arrangement entered into in 1836, acquired a power to sell; and cited *Baxter v. Willey*, 9 Vt. 276; 4 Kent 137, 142, 143; 7 Cranch 237, 482; *Hughes v. Edwards*, 9 Wheat. 489; 7 Johns. 40; 2 Fonbl. Eq. 260; *Campbell v. Worthington*, 6 Vt. 448; *Kelleran v. Brown*, 4 Mass. 443; *Cutler v. Dickinson*, 8 Pick. 386; *Flagg v. Mann*, 14 Pick. 467; *Eaton v. Green*, 22 Pick. 526; *Wright v. Bates*, 13 Vt. 341; 2 Atk. 98, 388; *Fry v. Porter*, 1 Chanc. Cas. 141; *James v. Odes*, 2 Vern. 84, 402; *Seaton v. Slade*, 7 Ves. 273; Pow. on Mort. 116; *King v. Edington*, 1 East. 288; *Eaton v. Whiting*, 3 Pick. 484; 1 Vern. 192.

W. Mattocks, for defendant, claimed, that the transaction between the parties in 1836 was a purchase, at a fair bargain, and for a valuable consideration, of the orator's equity of redemption, and that the

Hyndman v. Hyndman.

lease executed in 1840 was not in the nature of a mortgage, but was merely a conditional sale; and cited 4 Kent 143, 144; 2 Eq. Dig. 266, 267; 4 Ib. 386; Fonbl. Eq. 530, n. 263.

The opinion of the court was delivered by

REDFIELD, J. This is an appeal from a decree made by the chancellor of this circuit. When the case was heard in the court of chancery, it appeared to me to be one of so much doubt, that I did not feel justified in exposing the parties to the expense of taking an account of so long standing, until the necessity for such expense was fully established by the decision of this court. In that view I understand my brethren fully to concur. We by no means justify the practice, sometimes adopted in the court of chancery, of allowing appeals upon merely *formal* decrees, *without hearing*. Such a course is only calculated to increase the number of chancery appeals in this court and delay the final disposition of many of them, without any adequate saving. Every case should be *fully heard* in the court of chancery; and then, no doubt, the chancellor may, in his discretion, make a decree with a view of saving needless expense to the parties, in case the supreme court should be of opinion the orator cannot prevail.

But upon a full hearing of this case, upon very satisfactory arguments upon both sides, we incline to the opinion, that the orator ought to be permitted to redeem. Cases of this kind will always depend very much upon the determination of the facts. In that particular, one case is not a rule for the determination of any other case, (unless the two cases are alike in all particulars,—which never occurs,) and therefore need not be reported, so far as the facts are concerned.

The points of law here decided are, that when the orator contracted to sell out his equity of redemption to his mortgagee, he is, in this court, entitled to very favorable consideration, on account of the unequal relations in which the parties stood at the time. The one was the superior and the other the dependent. The one had power and resources; the other had neither, but was sore pressed by necessity. In addition to this, the defendant was clearly the mortgagee of the premises for such a sum, as it was not in the power of the orator readily to raise. The price was little more than two-

Hyndman v. Hyndman.

thirds the value of the premises. It was agreed, that the defendant should sell the premises, and, if they brought more than the price paid by the defendant, the plaintiff should have the surplus. Under these circumstances we think the contract must, in equity, still be considered a mortgage, with a power of sale in the mortgagee. It is well settled, that, in all transactions between the mortgagor and mortgagee, the conduct of the mortgagee will be watched very narrowly; 4 Kent 143, and note, and cases there cited. This is the language of all the cases, and of all the books, in regard to all purchases, made by trustees, of the interest of the *cestui que trust*. Such contracts are not positively disregarded in a court of equity; but they are viewed suspiciously and criticised with some degree of severity.

The only other ground, upon which the defendant claims to hold the estate free from the plaintiff's equity of redemption, is, that, in pursuance of the power of sale, he caused the estate to be sold at auction *and became himself the purchaser*. Such sales have always, in the English chancery, and in this country, unless when the matter is controlled by statute, been held voidable, at the election of the mortgagor, or *cestui que trust*, unless he delay for an unreasonable time to make his election,—in which case he will be held to have confirmed the sale by his acquiescence. The cases are too numerous upon this point, and there is too little conflict in the decisions, to require an elaborate review of the subject.

The State of New York, by *statute*, allows the mortgagee, in such cases, to become the purchaser, if he conduct the matter with perfect fairness. In that State, therefore, the decisions upon this subject rest upon a somewhat different basis from the English cases. In the former the sale is *prima facie* good, and it is therefore incumbent upon the *cestui que trust* to *impeach* its fairness; but in the latter the sale is, always, either good, or bad, at the election of the *cestui que trust*,—as in the case of a contract of sale between an infant and an adult. The authorities will be found sufficiently referred to and digested in *Davoue v. Fanning*, 2 Johns. Ch. R. 252, and in Mr. Sumner's note to *Whichcote v. Lawrence*, 5 Ves. 740. *Bergen v. Bennett*, 1 Caine 1, is somewhat of an elaborate case upon this point.

The decree of the chancellor is therefore reversed and the cause remanded to the court of chancery to be there proceeded with.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR,
FEBRUARY TERM, 1846.

[Continued from Vol. 18, page 370.]

PRESENT,
HON. STEPHEN ROYCE, }
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. DANIEL KELLOGG,

HARRIS MINER v. SOLOMON DOWNER, WORCESTER DOWNER AND
HORACE DANA.

Where the Plaintiff delivered property to W. Downer and H. Dana, and executed to them, by the name of Downer and Dana, a bill of sale of the property, in which he acknowledged receipt of payment by note, and the note which he received was, by Dana, signed "Downer & Dana," and it appeared in evidence, that there was in existence at that time, doing business, such a firm as "Downer & Dana," consisting of those two individuals, it was held, that the plaintiff could not recover on the note against another firm, of different style, consisting of the same Downer and Dana and a third person, notwithstanding it might appear, that the latter firm was also then doing business at the same place,—there being no testimony, tending, even, to prove that the latter firm had, at any time, done any act, which could have induced the plaintiff to believe, that Downer & Dana had ever been authorized to use

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their own name and style for the purposes of the other firm;—and that, upon this testimony, it was improperly left to the jury to find, whether the note was executed, and received by the plaintiff, as the note of the latter firm.

ASSUMPSIT on a promissory note, signed "Downer & Dana," for \$69,00, and dated November 14, 1837; and the plaintiff alleged, that the defendants were partners, at the date of the note, under the firm of S. & W. Downer & Co., and that the note was given for their benefit, and for property which went to their use, and was, by mistake, signed "Downer & Dana," instead of being signed by the style of the defendants' firm. The declaration contained, also, a count in *indebitatus assumpsit*, for goods &c. sold and delivered to the defendants. Plea, the general issue, and trial by jury,—HEBARD, J., presiding.

On trial the plaintiff gave in evidence the note declared on, signed "Downer & Dana," and proved that the signature was written by the defendant Dana. He also gave evidence, by parol, tending to prove that the defendants, before the date of the note, were co-partners under the firm of S. & W. Downer & Co., and that they so continued for some time after, and that the plaintiff sold and delivered, at the defendants' place of business, a quantity of hogs, which were received by Dana and Worcester Downer, and that the plaintiff received, in payment therefor, the note in suit.

The defendants gave in evidence the written articles of co-partnership between themselves, which bore date November 15, 1837, and also gave in evidence a bill of sale, signed by the plaintiff, which was in these words:—"Sharon, Nov. 14, 1837. Downer & Dana bought of Harris Miner eight hogs, weight 1150 lbs. 6 oz. \$69,00. Received pay by note; (*signed*) Harris Miner." The defendants also introduced testimony tending to prove, that a co-partnership existed between Worcester Downer and Dana, by the style of Downer & Dana, for a year previous to the date of the note declared upon, and that the business belonged solely to that firm, or to Dana alone, until the execution of the written articles of co-partnership between the defendants.

The defendants requested the court to instruct the jury, that there was no evidence, which would entitle the plaintiff to recover on the

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first count in his declaration, and that, if the plaintiff delivered the hogs and received in payment therefor the note in question, he was not entitled to recover in this suit.

But the court charged the jury, that if they found, that the defendants, at the time of the execution of the note and the sale and delivery of the hogs, were in fact co-partners and doing business as such, and the hogs were sold to that firm, and the note, executed by Dana, was executed as and for the note of that firm, and was so received by the plaintiff, the plaintiff was entitled to recover.

Verdict for plaintiff. Exceptions by defendants. After verdict the defendants moved an arrest of judgment for insufficiency of the declaration, and the motion was overruled; to which decision the defendants also excepted.

J. Barrett for defendant.

1. There was no evidence, tending, even, to show that the note was the note of S. & W. Downer & Co., or that the hogs were sold by the plaintiff to that firm, and consequently the jury were not at liberty to infer, that the note was given contrary to its import. *Siffkin v. Walker et al.*, 2 Camp. 308. *Holmes v. Barton et al.*, 9 Vt. 252. The court erred, in submitting the question to the jury. 3 Vt. 236. 5 Vt. 140, 141.

2. The plaintiff cannot recover upon the second count. Having received the note in payment for the hogs, he cannot resort to his claim for goods sold. *Hutchins et al. v. Olcott*, 4 Vt. 541.

3. The plaintiff cannot recover on the note in this action, even though the property, for which the note was given, was sold to S. & W. Downer & Co., and went for their benefit. The note was signed by the style of another firm, then in existence, by a member of that other firm, and when both the members of that firm were present, receiving the property for which the note was given. There is no pretence, that any fraud was practiced. If the note binds any one, it binds only the partnership, whose name it bears. 2 Camp. 308. 9 Vt. 252. *Emly et al. v. Lye et al.*, 15 East 7. Story on Part. 214.

4. The motion in arrest should have prevailed. Gould's Pl. 523. 8 Vt. 480, 501.

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J. S. Marcy for plaintiff.

The parol testimony, introduced by the plaintiff, tended to support both counts in the declaration, and the question as to its weight was for the jury to determine, and was properly left to them. The manner, in which the bill of sale and note were drawn and executed, is matter of evidence, merely, to be weighed with all the other evidence in the case. A variance, or mistake, in the names of parties to a contract, is not fatal to their contract; 1 U. S. Dig. 106, 187, 188. *Medway Manuf. Co. v. Adams et al.*, 10 Mass. 360; and it makes no difference, which party to the contract is misdescribed. In this case it was properly left to the jury to decide, upon the whole evidence, whether the note was in fact, if not in appearance, the contract of the defendants.

The opinion of the court was delivered by

BENNETT, J. The plaintiff in this suit has declared, in his first count, on a promissory note, dated Nov. 14, 1837, against the defendants, under the name of S. & W. Downer & Co. This note, he alleges, was, through mistake, signed Downer & Dana, instead of S. & W. Downer & Co., as it should have been, and was intended to be. The court below were requested to charge the jury,—1, That there was no evidence, from which the jury could find for the plaintiff on the first count;—2, That if the plaintiff, after delivering the hogs, received this note in payment, and receipted his bill for them, he was not entitled to recover on either count. We shall consider only the first of these points.

It appeared from the written articles of copartnership, that the defendants formed their business connection on the day after the note was given. The case finds, that the plaintiff gave parol testimony, tending to prove that in fact the defendants had been partners, under the name of S. & W. Downer & Co., before the date of the note, and that they so continued for some time after. Parol evidence was also given, tending to prove that there had also existed another partnership, composed of two of the defendants, but under the name and style of Downer & Dana. The hogs were delivered at the defendants' place of business, but were received by Dana & Worcester Downer, who composed the firm of Downer and Dana, and the bill of sale was made out in this latter name; and a note, signed in the

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same name, was received in payment. The court instructed the jury, that if they found that the defendants were in fact partners and doing business as such, at the time of the sale and delivery of these hogs and the making of this note, and that the hogs were sold to said company and the note executed therefor, and received as the note of said company, the plaintiff was entitled to recover. Did the testimony in the case entitle the plaintiff to such a charge? We think not.

It is well settled, that if a person advances money or delivers property to a firm, and takes the separate security of one partner, in his individual name, the firm cannot be sued upon it. In *Siffkin v. Walker*, 2 Camp. 308, the declaration stated, that the defendants made their certain promissory note, signed by Walker for himself and Rowelstone, whereby they promised to pay, &c. The plaintiff proposed to show, that both defendants were indebted to him on a charter-party of affreightment, and that the note in question was given by Walker in satisfaction of this joint debt. Lord Ellenborough used this pertinent language,—“How can I say, that a note, made and signed by one in his own name, is the note of him and another person, neither mentioned, or referred to?” He adds,—“The import and legal effect of a written instrument must be gathered from the terms, in which it is expressed; and I must treat this note as a separate security for a joint debt.” So, in *Emly v. Lye et al.*, 15 East 7, it appeared, that George Lye and E. L. Lye were partners, and their book-keeper was accustomed to receive bills of exchange from his employers, sometimes drawn in the name of the firm, sometimes in the name of G. Lye alone, and at other times in that of E. L. Lye alone,—as were the bills in question. These bills had been discounted from time to time by a broker, unacquainted with the defendants, who made no distinction between them, supposing them all drawn on the partnership account. The proceeds of the bills were in fact paid by the book-keeper to the partnership account, and the discount was allowed him in his account with the partnership. It was held, that E. L. Lye alone was liable on those bills drawn by him individually, and that the names of others could not be supplied by intendment, in order to charge them;—and even farther, that there could be no recovery on the *money counts*, as the broker was in no way induced by the defendants to believe it was a partnership

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concern, and to lend his money on that account. See, also, *Ex parte Hunter*, 1 Atk. 223; *Stackpole v. Arnold*, 11 Mass. 27; Story on Part. chap. 8, § 134, p. 222.

In the case of *Trueman et al. v. Loder*, 11 Ad. & El. 589, [39 E. C. L. 178,] the defendant, Loder, was a merchant residing at St. Petersburgh, and carried on business at London, through and in the name of one H., who was without capital himself, and who was regarded in London as only the representative of the defendant, whose name was painted on the outside of the counting house, and who was aware of the manner in which the business was transacted. H., having received notice from the defendant, that his services would not be required much longer, soon after purchased of the plaintiff a quantity of tallow, using his own name, as formerly. He intended to contract on his own account, but the plaintiff did not so understand it, supposing him still to represent the defendant, as before. It was contended, that, as H. had, after receiving the notice, commenced business for himself, the sale was made exclusively on his account. But it was held, that, since the plaintiff had no notice, that H. had ceased to represent the defendant, the latter was still liable. It was also contended, that, since the contract was made by H. and his name was incorporated in it, parol evidence was inadmissible, to show that the contract was in reality that of the defendant, and not of H. individually,—as that would vary the contract. But the court said, “Parol evidence was always necessary, to show that the person sued was the person contracting. Whether he does it in his own name, or in that of another, or in some fictitious name, and whether the contract is signed by his own hand, or by his agent's, are enquiries not differing in their nature from the question, ‘who is the person, that has just ordered goods in a shop?’” If the identity of the person is established, it is not varying the contract, to show that he used a name not his own.

This case was considered as not opposed to *Sifkin v. Walker*, or *Emly v. Lye*, but distinguished from them, on the ground, that, in both those cases, the company were carrying on business, at the very time, in the name of their firms; and it did not appear, that they had ever done any act, tending to lead the contracting party to believe, that the partnership had authorised the individual partners to employ their private names for partnership purposes. But in this

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case the business was done in the name of H., apparently as principal; and with the knowledge of the defendant; and, for all legal purposes, the name H. signified Loder, the defendant.

In the case at bar Downer & Dana had been in partnership for a year before the note was given, and no evidence was offered, to show a dissolution at that time. Neither does it appear, that the firm of S. & W. Downer & Co. had, at any time, done any act, which could have induced the plaintiff to believe, that Downer & Dana had ever been authorized to use their own name and style for the business purposes of the other firm. Nor does the evidence tend to show, that Dana intended to bind the firm of S. & W. Downer & Co., when he signed this note, or that the plaintiff had any reason to suppose, that he was getting the security of Solomon Downer, superadded to that of Downer & Dana. The hogs were received by Downer & Dana, and the note, signed by Dana in the name of their firm, was received in payment; and the bill was made out, stating that Downer & Dana had bought the hogs of the plaintiff,—which bill was receipted at the time by him. And evidence tending to prove, that the defendants were copartners under the name of S. & W. Downer & Co., when the note was given, and that the hogs were received by Downer & Dana at the defendants' place of business, has no tendency to show, that the firm of S. & W. Downer & Co. ever authorized the firm of Downer & Dana to use their own name for the common purposes of the former, and furnished no reason to the plaintiff to suppose he was receiving the note of S. & W. Downer & Co., in place of the one he did receive.

In *Trueman v. Loder*, cited above, the defendant cited several cases, to establish this position,—“That the fact, whether an agent, or partner, bound himself alone, or his principal, or firm, was to be determined by his intention, at the time, to deal for himself, or his principal, or the firm.” But Lord Denman, Ch. J., says,—“On examining all these cases, it will be found, that the contracting party was carrying on two different concerns at the same time, one for himself, and one for his principal, or the firm; and the world would know him in two different capacities; and every one dealing with him would be bound to inquire, in which capacity he was acting on any particular occasion;”—39 E. C. L. 180,—where are cited *Ex parte Bolitho*, 1 Buck 100; *Bank of Scotland v. Watson*, 1 Dow-

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40. But in the case before us there is no pretence, that Downer & Dana were, at this time, carrying on two concerns under that name,—one for themselves and one for S. & W. Downer & Co. No instance is shown, in which the firm of S. & W. Downer & Co. have, in the transaction of their business, adopted the name of Downer & Dana; and there is no evidence to show, that in this instance they used it as a *feigned name, or otherwise.*

No doubt it might be competent, to show that Downer & Dana and S. & W. Downer & Co. meant the same individuals; but it is quite a different question, whether, *at law*, the plaintiff could be permitted to show, by parol, that the note in question was signed Downer & Dana by mistake, instead of S. & W. Downer & Co. In *Jackson v. Hart*, 12 Johns. 77, parol evidence was held inadmissible, to show that letters patent, granted to George Houseman in his own name, and who was a real person, were intended to be granted to another individual, named George Hosmer. The rule is indisputable, that parol evidence is inadmissible to contradict, or vary, a written contract of clear, certain and unequivocal import. In the case last cited the court say, that the rule, as to explaining latent ambiguities, has no application.

It is farther to be observed, that between the defendants, in the present case, there existed written articles of copartnership, executed the day after the note was given, and which are made a part of the case. This partnership took effect, by intendment, on the day of the date of these articles. Parol evidence is inadmissible to contradict this intendment. *Story on Part.* § 194. *Williams v. Jones*, 5 B. & C. 108. The articles of copartnership recognized no power in Dana to bind this firm by any note he might have executed previously, under whatever name. As between these partners, all parol negotiations, or agreements, whether prior or cotemporaneous, relative to the formation of the partnership, are merged in these written articles. *Reed v. Wood*, 9 Vt. 285. *Gardner Manufacturing Co. v. Heald*, 5 Greenl. 381. *Brigham v. Rogers*, 17 Mass. 571. *Austin v. Sawyer*, 9 Cow. 39. But if, prior to the execution of these articles, the defendants had held themselves out as partners, and had, as such, acquired credit, they doubtless would be liable to any person trusting them.

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We discover no evidence, in this case, to charge Solomon Downer. The note was not, on its face, the note of his firm ; and there is no evidence to show he ever authorized Dana to use the name of Downer & Dana, in making contracts for them, or that Dana designed to bind the firm of S. & W. Downer & Co., or that the plaintiff so understood the transaction.

We think, for these reasons, the court below erred in submitting to the jury, to find whether this was the note of S. & W. Downer & Co.

Whether a state of facts could be made out, sufficient to entitle the plaintiff to recover of these three defendants, it is unnecessary to decide. Neither are we inclined to pass upon the motion in arrest ; but we simply reverse the judgment of the county court, and remand the case to that court to be farther proceeded with.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA,
MARCH TERM, 1846.

[Continued from Vol. 18, page 569.]

PRESENT,
Hon. CHARLES K. WILLIAMS, CHIEF JUDGE.
Hon. STEPHEN ROYCE, } ASSISTANT JUDGES.
Hon. DANIEL KELLOGG, }

JOHN HERREN v. JAMES CAMPBELL.

If the holder of a promissory note, on which there is due more than \$100, indorse upon it, as payment, a sum which will reduce the amount apparently due upon the note to a sum less than \$100, and do this without any payment being in fact made by the defendant, and for the mere purpose of bringing the note within the jurisdiction of a justice of the peace, and then commence an action upon the note before a justice, the action will not, on appeal, be dismissed by the county court, for want of jurisdiction in the justice.

Assumpsit upon a promissory note for \$250, dated March 6, 1835. The action came to the county court by appeal, the plaintiff claiming, in his declaration, that there was but \$98,00 due upon the note at the time suit was brought. Plea, the general issue, and

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trial by the court,—**REDFIELD**, J., presiding. The defendant also filed a written motion to dismiss the suit for want of jurisdiction in the justice of the peace, before whom the suit was commenced.

On trial it appeared, that the sum of \$41,50 was indorsed upon the note by the plaintiff, at the time he commenced this action, and that this was done without any payment being made by the defendant, and without the knowledge or consent of the defendant, and that this indorsement reduced the amount apparently due upon the note to a sum less than one hundred dollars, and was made for the convenience of commencing an action before a justice of the peace.

The county court held that the justice had not original jurisdiction of the suit, and dismissed the action. Exceptions by plaintiff.

W. Mattocks for plaintiff.

C. Davis, for defendant, cited *Boutwell v. Mason et al.*, 12 Vt. 608.

The opinion of the court was delivered by **ROYCE**, J. It is clear, that a fictitious indorsement, like the one in question, could be of no avail to the creditor, if designed to affect the operation of the statute of limitations, or, indeed, to defeat or abridge any valuable right of the debtor. The question, therefore, is, whether any such right of the defendant was infringed by this act of the plaintiff. The apparent effect was to ease and benefit the defendant, by remitting a portion of his debt. In cases of uncertain damages, as trespass and many others, the plaintiff, though entitled, from the extent of his injury, to commence his action before the county court, may yet sue before a justice of the peace, by limiting his *ad damnum* to one hundred dollars, or less. And, as said by **REDFIELD**, J., in *Perkins v. Rich*, 12 Vt. 595, "this can never do injustice to the defendant, as it is only a privilege to reduce a claim for damages." It is true, that in actions on promissory notes the *ad damnum* is not a test of jurisdiction; for that is made to depend upon "the amount of the note, deducting indorsements." Rev. St. c. 26, § 8. But in an analogy to the rule established in the other cases alluded to, it would seem, that a party may as properly reduce his claim for damages in cases of this class, as in those; and that in

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order to do so he has only to acknowledge, by way of indorsement upon the note, a part satisfaction of the sum due. As county courts and justice courts are alike constituted legal and competent tribunals within their respective spheres, we are scarcely authorised judicially to affirm, that any certain advantage is gained, or lost, to a party, by being called to answer before the one instead of the other. If a suit may happen to be sooner terminated, when brought before a justice, it will at the same time be less expensive and burdensome to the defendant.

It is urged, however, that such an indorsement is not binding on the party making it, but that he is at liberty to expunge or disregard it, and enforce collection of his demand, as if the indorsement had not been made. But should this be conceded, it does not appear to affect the point of analogy before noticed. For the indorsement is made binding upon the plaintiff by statute, for all the purposes of the action, whilst pending as a justice suit, as it certainly would be, after final judgment recovered; and if he could avoid the effect of it by nonsuit, or discontinuance, and thus enable himself to commence a county court action, he could do the same in the other cases referred to.

That an indorsement, in order to change jurisdiction from the county court to a justice of the peace, need not be predicated upon a payment properly applicable to the note, on which it is endorsed, was decided in *Boutwell v. Mason et al.*, 12 Vt. 608. Hence it only remains to be determined, whether this effect must be denied to the indorsement, when it is not founded upon actual or supposed payment, but is made for the mere purpose of thus changing jurisdiction. And since we do not perceive that such an act can justly be regarded as fraudulent, or injurious towards the debtor, neither do we think it is rendered inoperative by any necessary construction of the statute.

Judgment of county court reversed, and cause remanded to that court for farther proceedings.

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HEZEKIAH AYER v. STEPHEN HAWKINS.

Where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact, that within six years the defendant made a general payment to the plaintiff on account of some one, or more, of the notes, or of the indebtedness manifested by them, it was held, that a promise of farther payment must be implied. It is not essential, that the defendant should have recollect the giving of the notes, at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it.

If a debtor, owing several demands to his creditor, make a general payment, and neglect to direct its application, the right of designation belongs to the creditor; yet he must make an application, to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held, that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent, in date, to the others, and that the effect would be to take the note, upon which the application was made, out of the statute of limitations,—but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute.

ASSUMPSIT upon three promissory notes. Pleas, the general issue and statute of limitations, and trial by jury,—REDFIELD, J., presiding.

On trial it appeared that the notes were executed more than six years previous to the commencement of the action. The plaintiff then proved a conversation between himself and the defendant, in which the defendant in effect admitted, that he had paid twenty dollars to the plaintiff in 1841,—that the plaintiff, in the same conversation, told the defendant he had indorsed the money upon the notes, and asked defendant if he had done right in so doing,—and that the defendant replied, he knew nothing about any notes. It appeared that the plaintiff had divided the twenty dollars among all the notes sued, indorsing a part upon each. The defendant insisted that he was entitled to a verdict, upon this evidence; but the court decided, that the evidence must be submitted to the jury. The defendant

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then introduced evidence, tending to prove that the twenty dollars were loaned by him to the plaintiff.

The court charged the jury, that if, from the evidence, aside from the indorsement upon the notes,—which, being in the hand writing of the plaintiff, was not evidence in his favor,—they were satisfied, that the defendant paid to the plaintiff twenty dollars, to apply towards debts which he owed the plaintiff, and gave no directions, at the time of payment, upon what it should be applied, it thereby became the right of the plaintiff to make the application upon such claims, as he had against the defendant, in any of the ordinary modes of making such applications,—but not in an extraordinary and unreasonable manner; that, there being no evidence that the plaintiff had any other demands against the defendant, upon which this money could apply, except the notes in suit, they might infer, that it was intended to apply upon the notes, or some one of them, and if so, that it would remove the bar of the statute of limitations as to such note, or notes; but that the plaintiff could not apply a portion of the payment upon each note, and thus take all out of the statute; that the most he could do would be to apply it upon that one of his demands, which would be most favorable to himself; and that, as all the notes were barred by the statute, the plaintiff would be justified in making the application upon the largest note, although it was the most recent in date, if there was nothing from which it could be ascertained upon which particular note the defendant intended the application to be made.

Verdict for plaintiff for the amount due upon the largest note. Exceptions by both parties.

T. Bartlett for defendant.

The defendant insists, that the evidence has no legal tendency to prove that he let the plaintiff have \$20 to apply on these notes, or either of them. Instead of this it proves the contrary; for the defendant, when asked by the plaintiff whether he had done right in indorsing the money on the notes, replied that he knew nothing about any notes. Because the plaintiff shows no other claim against the defendant, it is by no means to be inferred, that the money was to be applied on *these notes*, in the absence of all direct evidence to that point.

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G. C. & E. A. Cahoon for plaintiff.

1. The court below decided correctly, in referring the plaintiff's evidence to the jury. The sufficiency of admissible evidence is a question for the jury. *Forbes et al. v. Davison*, 11 Vt. 660.

2. The instruction by the court to the jury, that the application of the payment must be confined to one note, in the absence of any direction by the debtor, was erroneous. There is no evidence, which shows any intention on the part of the debtor, relative to the application of the payment made by him. It was a *general payment*; and in such case the creditor may, at any time before a controversy arises, make such application as he sees fit. *Cro. Eliz.* 68. 3 Stark. Ev. 1093, n. 1. *Briggs v. Williams*, 2 Vt. 283. 4 Cranch 317. 9 Wheat. 720. *Robinson et al. v. Doolittle et al.*, 12 Vt. 246. *Rousseau et al. v. Cull et al.*, 14 Vt. 83. *Brewer v. Knapp*, 1 Pick. 332. *Washington Bank v. Prescott*, 20 Pick. 339. *Blackstone Bank v. Hill*, 10 Pick. 129. *Bosanquet v. Wray*, 6 Taunt. 597. "If neither party elect, the law will make the application; which requires that the debts, which have the most precarious security, should be first extinguished; and the courts are bound to carry into effect the object of the law, that is, *so to apply the payment, that the creditor may obtain satisfaction for his debt.*" *TURNER, J.*, in *Briggs v. Williams*, 2 Vt. 283. It would be singular, if the creditor were forbidden to make the same application for himself, which the law will compel the court to make for him, viz. in such manner, *as to obtain satisfaction for his debt.*

The jury having found that the \$20 passed from the defendant as *payment*, we insist, that it not only removes the statute bar from, but, in the absence of restricting or qualifying circumstances, amounts to an acknowledgment of, a *general indebtedness*,—not upon one note merely, but upon all; for all constitute but *one indebtedness*, which is reduced by the amount of the payment.

The opinion of the court was delivered by

ROYCE, J. The questions saved for the consideration of this court relate exclusively to the second ground of defence;—1, Whether the facts appearing in the case were sufficient to warrant the implication of a new promise to pay all or any of the notes in suit,—and 2, Whether the plaintiff could avoid the effect of the statute as to all

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the notes, by dividing and distributing the payment in the manner which the case discloses.

It has been too long settled to admit of present discussion, that part payment of a debt barred by the statute, if made without protestation against farther liability, is a recognition and acknowledgment of such debt at the time of making the payment, from which a promise to pay the residue shall be implied. Hence we have only to inquire, under this branch of the case, whether the sum of twenty dollars, which passed from the defendant to the plaintiff in 1841, constituted such an unconditional payment upon all or either of these notes. The jury have negatived the pretence, that it was advanced as a loan; and there is surely no ground to suppose it intended as a gift. It must, therefore, be taken to have been a payment upon some existing indebtedness. And as no evidence tended to show the existence of any claim whatever, aside from the notes, it was a legitimate inference, and, indeed, the only one which could properly be drawn, that the payment was made on account of some one or more of the notes, or of the indebtedness manifested by them. It is not essential, that the defendant should have recollect ed the giving of the notes, if he was aware of the indebtedness for which they were given, and acted with reference to it. And these facts, at least, are established by the verdict. A promise of farther payment was consequently to be implied, and it remains to be determined how far the implication should be carried. This involves the second question presented.

A party paying money may always accompany the payment with directions to govern its application. If he owes his creditor several debts, he may apply the payment to either. In this the authorities all concur. And it is a rule equally well settled, that upon the neglect of the debtor to direct an application of the payment, the right to make it generally devolves upon the creditor. There is also a third case, where both parties neglect the application, and where the law is left to make it upon principles of equity and justice; but that case may be passed without remark on this occasion, as it is not now before the court. At present we have only to inquire, how a creditor, holding several demands against the same debtor, is at liberty to appropriate a general payment. The rules upon this subject were not established with any primary reference to

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such a state of things as existed in the present case, where all the demands of the creditor were barred by the statute. Yet cases have occurred, where his demands were of different degrees, where they were differently and unequally secured, where a part were barred by the statute of limitations, and where some were legal demands and others merely equitable. And he has been allowed to apply payments upon either of such demands, when the debtor has omitted to give any direction; Chit. Cont. 753; 13 Petersd. Ab. 247; and cases there cited. His right may not be free from doubt, however, in either of the two cases last mentioned; in the last it has been much questioned.

But though it is usually said, that the creditor may apply such a general payment as he pleases, there are many cases, where he is not indulged to this extent, even in the absence of any express direction from the debtor. The right to direct the application being universally conceded to the debtor in the first instance, regard is still had to his intention in the matter, whenever the facts and circumstances render that intention sufficiently clear and certain. Chit. Cont. and Petersd. Ab. *ut supra*. *Newmarch v. Clay*, 14 East 239. It has even been decided, that the creditor never acquires the right to apply such a payment with a view merely to his own interest or convenience, unless the debtor has had an opportunity to direct its application; as if the money comes to the creditor without having passed through the hands, or under the control, of the debtor. Chit. Cont. 757, and cases cited. All this is sufficient to show, that the right of designation among the creditor's demands is essentially the right of the debtor. And hence, if he silently waives it in favor of the creditor, it should be intended that he does so relying upon a mode of application to which he could not justly or reasonably object.

But the course which the plaintiff pursued in this instance, by distributing the payment upon all his demands, and thus seeming to preclude all defence under the statute as to either, was such as he doubtless knew was not anticipated and would not be approved or sanctioned by the defendant. It is entirely without precedent, so far as I have discovered, among the numerous cases reported on this subject. And we are fully convinced, that it has not produced the effect designed. The plaintiff was at liberty to select any one, even

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the largest, of the notes, and apply the payment upon it; for so much had been yielded to him by the defendant. And the defendant must be taken to have understood, that his legal liability upon such note would be thereby revived. But beyond this his presumed intention or expectation cannot justly be extended. As the charge of the judge was in accordance with these views, and the plaintiff was enabled to recover to the extent of his legal right, there is no apparent error to be corrected, and the judgment below is affirmed.

**EDWIN FISHER v. JOHN BECKWITH.**

There is no rule, requiring that a bill of exchange should be actually shown to the drawee, in order to a valid and binding acceptance;—it is enough, if, when applied to for acceptance, he is enabled, by seeing the bill, or otherwise, to give an intelligent answer.

An acceptance of a bill of exchange is not a contract within the statute of frauds; it is rather an undertaking to pay the acceptor's debt to the drawer, than to pay a debt due from the drawer to the payee.

An acceptance of a bill of exchange, by parol, is not void for want of consideration, when it appears that there was then a debt due from the acceptor to the drawer, on account of which the bill was drawn.

And the contract between the acceptor and the payee, created by the acceptance, cannot be affected by any subsequent arrangement between the acceptor and the drawer.

Where a bill was drawn payable on demand, and the plaintiff alleged an acceptance according to its tenor, and it appeared, from the evidence, that the acceptor, upon being applied to for acceptance and payment, replied, that the drawer had told him all about it, that it was all right, and that he would pay it in a few days, it was held no variance.

ASSUMPTION. The plaintiff alleged, in his declaration, that one Woodman, on the 20th day of March, 1843, at Norway, in the State of Maine, drew his bill of exchange upon the defendant, thereby requiring him to pay to the plaintiff, or order, nineteen dollars, on demand, and that the defendant, on the first of April, 1843, accepted

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the said bill, and thereby became liable to pay to the plaintiff the sum therein specified, according to its tenor. Trial by the court, upon a case stated,—**REDFIELD, J.**, presiding.

It was agreed by the parties, that the bill described in the declaration was drawn, as therein alleged, and that, in April, or May, 1843, the plaintiff handed the bill to one Denison, as his agent, to call on the defendant and notify him thereof, and to ascertain whether he would accept the same; that Denison, within a few days, saw the defendant at Sutton, where he resided, and notified him that he had the bill, and the defendant replied, that he had seen Woodman, who was then in the vicinity, and Woodman had told him all about it, and that it was right, and that he might tell the plaintiff that he would be at Burke in a few days and would pay the money on the bill; and that Denison, shortly after, communicated this to the plaintiff. It was shown, also, to the court, that the defendant, after this, paid the note which he owed to Woodman, and on account of which the bill was drawn.

Judgment for plaintiff, by consent. Exceptions by defendant.

— for defendant.

1. The defendant's saying that he would pay the order to the plaintiff was a promise to pay the debt of another and void by the statute of frauds, not being in writing. 2 Stark. Ev. 231, n. (a.)
2. There was no consideration for his promise, as no liability was extinguished between the defendant and Woodman, or between Woodman and the plaintiff.
3. This order was not a mercantile draft, so that a parol acceptance would bind the defendant.
4. The defendant has been compelled to pay his whole debt to Woodman; so that, if held liable in this suit, he will be compelled to pay so much of his debt twice.
5. Presentment of the draft was necessary, in order to fix the defendant. It does not appear by the case, that Denison had the order with him; he did not inform the defendant of its amount, nor when it was payable; nor did he ask for the defendant's acceptance, nor demand payment. Bayl. on Bills 112, 113, 140.
6. If there was any acceptance, it was conditional, and should have been so declared upon. Bayl. on Bills 112–114.

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G. C. & E. A. Cahoon for plaintiff.

1. An absolute acceptance of a bill of exchange is an engagement to pay it according to its tenor ; and this may be done by *parol*. 1 Swift 424, 425, 429. Esp. N. P. 106. *Clarke v. Cock*, 4 East 67. *Johnson v. Collings*, 1 East 103. Chit. on Bills 223. *Sproat v. Matthews*, 1 T. R. 182. *Lumley v. Palmer*, Rep. Temp. Hard. 74.

2. The fact, that the defendant, after he had promised to pay the order to the plaintiff, paid to the drawer the note, on account of which the order was drawn, cannot affect the plaintiff's right of recovery. *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1663. 1 Esp. N. P. 115, 117. *Thornton et al. v. Dick et al.*, 4 Esp. R. 270.

The opinion of the court was delivered by

Royce, J. It is objected in behalf of the defendant, that there was not a due presentment of the order, either for acceptance, or payment,—nor any valid acceptance.

The case does not show, that the order was exhibited to the defendant, though he was informed by Denison, the plaintiff's agent, that he had it ; and this was at Sutton, the defendant's place of residence. But an actual view, or precise description, of the order was not important to the defendant, under the circumstances. He had previously been apprised of all that was material by Woodman, the drawer; and his language to Denison fully implied, that he neither wished to see the order, nor to be more particularly informed respecting it. Besides, there is no rule, requiring that a bill of exchange must be actually shown to the drawee, in order to a valid and binding acceptance. A party may bind himself by an acceptance of a bill not yet drawn ; as in the great case of *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1663. It is enough, if, when applied to for acceptance, he is enabled, by seeing the bill, or otherwise, to give an intelligent answer. 1 Har. Dig. 493, and cases there cited. In this instance, the question of a proper presentment for acceptance is involved in that regarding the validity of the acceptance itself ; for if the bill, or order, was well accepted, it is idle to say it was not sufficiently presented for that purpose.

A distinct presentment for payment is usually necessary, in order to fix the liability of antecedent parties to the bill, as the drawer and indorsers. It is always so, for that purpose, when the time of

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payment is to be distinct, and subsequent to that of acceptance. The reason is, that the undertaking of such parties is conditional, requiring a demand of payment, when due by the terms of the bill, and timely notice back to them, if payment is refused. But the obligation of the acceptor, if he accepts without qualification, is as absolute as that of the maker of a note. And hence it is laid down as a rule, that "the acceptor of a bill, or maker of a note, is in general liable thereon, although the instrument has not been presented for payment; it being legally incumbent on the acceptor, or maker, to discover the holder, and pay it without presentment." Chit. Cont. 728. *Turner v. Hayden*, 4 B. & C. 1. It is sufficient, however, for the present purpose, to notice, that the bill in question was made payable at sight, or on demand; so that a general acceptance would entitle the holder to immediate payment.

It is objected to the acceptance, that it was an undertaking to pay the debt of another, viz. the debt of Woodman to the plaintiff, and, being by parol and not in writing, was void under the statute of frauds,—that it was given without consideration,—and that it was a conditional or partial acceptance, and therefore variant from the declaration.

It is not disputed, that, at common law, a parol or oral acceptance of a bill may be sufficient and binding. Nor am I aware, that, in an ordinary case, it was ever held to be a contract within the statute of frauds. Most, if not all, the reported decisions, adjudging such an acceptance good, have been subsequent to the English statute of frauds. *Ereskine v. Murray*, 2 Str. 817; *Lumley v. Palmer*, Ib. 1000; *Sproat v. Matthews*, 1 T. R. 182; and many others. It is the common presumption, that a bill of exchange in the usual form is drawn on account of some indebtedness from the drawee to the drawer. *Vere v. Lewis*, 3 T. R. 182. *Symons v. Parmenter*, 1 Wils. 185; 2 Br. P. C. 43, S. C. in error. *Chittenden v. Hurlburt*, 2 Aik. 133. And in the present case that presumption is confirmed by evidence. It follows, that the defendant's acceptance was rather an undertaking to pay his own debt to Woodman, than Woodman's debt to the plaintiff; although such a payment of the former might operate as payment of the latter also.

What has been said disposes of the objection for want of consideration.

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And if the plaintiff acquired a cause of action upon the acceptance, it could not be discharged, or affected, without his consent, by what afterwards took place between the defendant and Woodman.

It only remains to say a word upon the point of variance. The declaration alleges a promise of the defendant, consequent upon his acceptance of the bill, to pay it according to its tenor. It was drawn payable on demand, and the defendant said he would pay it in a few days. But we think it is not to be inferred, when all his declarations are considered, that he meant to qualify his immediate liability according to the terms of the order. He had already declared, that "Woodman had told him all about it, and that it was right." These expressions import that the requirement to pay on demand was right, and that he assented to it; whilst those which followed were indefinite as to time, and were apparently used to gain a short indulgence, rather than to postpone his legal liability.

Judgment of county court affirmed.



TOWN OF LYNDON v. NATHANIEL COOK.

Where, in an action of tort against several defendants, the plaintiff, on trial, voluntarily entered judgment in favor of one of the defendants and then called that defendant as a witness, and he testified, and a verdict was returned in favor of the other defendants, and thereupon the plaintiff entered a review of the case as to all the defendants, and, at the next term, the defendant, in whose favor judgment was voluntarily entered, moved to set aside the review as to himself, it was held, that there was no error in the county court, in overruling the motion.

In this case, which was originally commenced against Cook and several other defendants, Cook filed a motion in the county court, alleging that at the preceding term of the court the plaintiff's voluntarily directed judgment to be entered in his favor and then called him as a witness against the other defendants, that he testified, and a verdict was rendered in favor of the other defendants, and that the

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plaintiffs then entered a review of the case as to all the defendants,—and moving that the court should order his name stricken from the docket and allow him his just costs.

The county court,—**REDFIELD, J.**, presiding,—overruled the motion, and the trial of the case proceeded, and a verdict was rendered in favor of the other defendants, and against Cook. Exceptions by Cook.

C. Davis for defendant.

T. Bartlett for plaintiffs.

The opinion of the court was delivered by

Royce, J. The case does not find, whether the facts set forth in the motion were true; and hence we find some difficulty in treating them as *facts*. But, regarding them as such, we do not perceive that the decision of the county court, in denying the motion, can be pronounced erroneous. Had the question been brought here, whether this defendant was legally required to testify for the plaintiffs on the first trial, upon a separate judgment being entered for him, without any waiver, by the plaintiffs, of their right to review as to him, it would doubtless have received a different consideration. But without such waiver, or something on the record, showing that judgment to have been final, the cause was equally reviewable against this defendant, as against the others.

Assuming, then, that the motion truly sets forth the proceedings at the first trial, we can only say, it presents a case of irregularity, and perhaps injustice, in regard to this defendant;—but the irregularity, being previous to the review, and not excepted to at the time, is beyond the correction of this court.

Judgment of county court affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE,
APRIL TERM, 1846.

PRESIDENT,
Hon. STEPHEN ROYCE,
Hon. MILO L. BENNETT,
Hon. DANIEL KELLOGG, } ASSISTANT JUDGES.

HIRAM WOLCOTT v. TOWN OF WOLCOTT.

Where a transient person is taken sick and is in need of relief, and the person, at whose house he is, gives notice to the overseers of the poor of the town in which he resides and requests them to provide for the pauper, and the overseers request him to do what is necessary, he may recover for his services and expenses, in taking care of the pauper, in an action on book account against the town.

The acts of a major part of the overseers of the poor, in this respect, are binding upon the town.

Book Account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows.

In March, 1842, one Eunice Shippe, a transient person, was taken sick at the house of the plaintiff, in the town of Wolcott, and

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was in need of relief. On the 31st day of March the plaintiff gave notice of this to the overseers of the poor of the town, and requested them to provide for her. One of the overseers, Mr. Whitney, told the plaintiff "to go on and take care of the girl, and he would be up and see to her." The plaintiff did continue to take care of and support her, until she died, which was on the second day of April; and he also defrayed the expenses of her funeral. On the second day of April another of the overseers of the poor of the town went to Whitney, the overseer who had seen the plaintiff, requesting Whitney to attend to the case, saying that it ought to be seen to immediately, and informing him that he was about going out of town and could not attend to it himself. The plaintiff claimed to be allowed, for his services and expenses, the sum of \$13,25.

The county court accepted the report of the auditor and rendered judgment thereon for the plaintiff. Exceptions by defendants.

W. G. Ferrin, for defendants, insisted, that the action on book account could not be sustained, upon the facts reported by the auditor; but that the plaintiff should have founded his action upon the statute; and cited *Middlebury v. Hubbardton*, 1 D. Ch. 205; *Danville v. Putney*, 6 Vt. 512; *Jamaica v. Guilford*, 2 D. Ch. 103; *Houghton v. Danville*, 10 Vt. 537; and *Castleton v. Miner*, 8 Vt. 209.

Poland, for plaintiff, cited *Danville v. Putney*, 6 Vt. 512; *Hubbell v. Gale*, 3 Vt. 266; *Vt. M. Fire Ins. Co. v. Cummings*, 11 Vt. 503; *Stone v. Berkshire Cong'l Society*, 14 Vt. 86; and *Washington v. Rising*, Brayt. 188.

The opinion of the court was delivered by

BENNETT, J. It is objected, that the plaintiff has no such claim, as will enable him to sustain an action on book account against the town.

It has been frequently decided in this state, that this form of action may well be sustained against towns; and we see no reason, why the plaintiff should not recover. The pauper fell sick at the plaintiff's house, and notice was given of that fact, on the 31st of March, 1842, to the town; and on the evening of the same day Whitney,

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one of the overseers of the poor of the town, was called upon by the plaintiff and was requested to provide for the pauper. Whitney told the plaintiff to go home and take care of the girl, and he would be up and see to her; and on the second day of April Mr. Stone, another overseer of the poor, requested Whitney to attend to the business of providing for this pauper without delay, as he was going from home.

If there had been nothing in this case, except the fact, that this transient pauper had been supported by the plaintiff, after he had given notice to the town and had requested the overseers of the poor to provide for her, the obligation upon the town would have been what has been called a *statutory obligation*, simply; and the action on book account could not have been sustained. In such a case the action does not arise out of any contract, expressed or implied, but is given by statute. To extend the action on book to such a case would be to abolish all the distinctive boundaries governing that form of action.

But in this case there was evidence before the auditor, tending to prove that the town assumed the support of the pauper, by requesting the plaintiff to provide for her. No doubt the acts of a major part of the overseers are binding upon the town. It is a general principle, that where a board of officers is constituted, to perform a duty provided by law, the act of a majority is the act of the whole body. *King v. Beeston*, 3 T. R. 592. *Jones v. Andover*, 9 Pick. 146. *Damon v. Granby*, 2 Pick. 345. In this case the request of Stone to Whitney on the second of April, that he would attend to the business without delay, would have the effect to ratify his previous proceedings in providing a support for this same pauper, if Whitney chose to let the matter rest upon what he had previously told the plaintiff. The auditor was the judge of the sufficiency of the proof, to show a request to the plaintiff to support the pauper. It would be no matter of error, if this court should think the evidence insufficient. It having been in effect found, that the services were performed at the request of the town, the action on book account well lies, upon principles long established relating to that action.

Upon the death of the pauper it was incumbent upon the town to see that she had a christian burial; and there is no reason, why the plaintiff should not be allowed the charge for funeral expenses. The

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duty of the plaintiff to bury the pauper at the expense of the town was *incident* to the obligation, which he assumed at the request of the town, to provide for her.

The judgment of the county court is affirmed.

**JOSHUA SAWYER v. FREEBORN WHITE AND HANNAH WHITE,
his wife.**

A judgment against one of two signers of a joint and several promissory note extinguishes the note as against him, but does not affect the liability of the other signer.

And if the payee of such note indorse it in blank, and recover judgment, in the name of a third person, but for his own benefit, against one of the signers, and obtain part satisfaction, he may yet deliver the note to another third person, for the purpose of collecting the balance from the other signer, and such other person may, by virtue of the same indorsement in blank, sustain an action in his own name against such other signer. The indorsement may be regarded as the indorsement of two several notes; and the judgment against one signer, in the name of an indorsee for purposes of collection, only deprives the indorsement of effect as to that signer, but leaves it in force, as against the other.

ASSUMPSIT upon a promissory note, signed by the defendant Hannah White, while sole, and one Daniel Cressey, by which they jointly and severally promised to pay to one Weare Tappan, or order, \$263.68, on demand with interest. The action was brought in the name of the plaintiff, as indorsee of Tappan. Plea, the general issue, with notice of special matter of defence, and trial by the court,—ROYCE, J., presiding.

On trial it appeared that, in 1834, Tappan, who was then and still is the owner of the note, indorsed the note in blank, and caused an action to be commenced upon it, in the name of one Atkins as plaintiff, against Cressey, and recovered judgment therein against Cressey, and obtained part satisfaction of the judgment from him. In 1837 Tappan transmitted the note to the plaintiff, with the same blank indorsement upon it, and directed a suit to be commenced against the present defendants, for the purpose of collecting the bal-

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ance of the note, not collected from Cressey. The plaintiff filled up the indorsement to himself and commenced the suit in his own name.

The court rendered judgment for the plaintiff. Exceptions by defendants.

Poland for defendants.

We insist, that one and the same indorsement, by the payee, of a note signed by two persons, cannot be considered a legal transfer of the note to one indorsee as to one signer, and to another indorsee as to the other signer. Had Tappan, at the time he brought his suit and recovered his judgment on this note against Cressey, in the name of Atkins, changed his blank indorsement to a special one to Atkins, it will not be claimed, but that the legal interest in the note would have been thereby vested in Atkins; and any subsequent suit against Cressey, or the other signer of the note, must have been brought in the name of Atkins. The defendants contend, however, that what was done is fully equivalent to a filling up of the indorsement by Tappan to Atkins. That separate suits can be sustained against the signers of a joint and several note is well understood; but this cannot be done by several plaintiffs. A note may be several as to the signers; but it can never be so as to the payees, or indorsees; their rights are always entire, or joint.

J. Sawyer and D. A. Smalley for plaintiff.

1. The rule is settled, that a judgment against one of joint and several promissors is never a bar to an action on the promise against the others, unless the judgment is satisfied. *Porter v. Ingraham*, 10 Mass. 88. *Ward v. Johnson et al.*, 13 Mass. 148. *Sheeley v. Mandeville et al.*, 6 Cranch 253. Chit. on Bills 570.

2. The case shows, that the note was indorsed to Atkins, and sued by him, for Tappan's benefit solely, and without consideration. Tappan, therefore, never parted with the title to the note, and could at any time take back the note and transfer it to another person, or erase the indorsement and sue the note in his own name. *Bank of Utica v. Smith*, 18 Johns. 230. *Bowdish v. Green*, 15 Johns. 247.

3. The plaintiff stands in the same position that Tappan would have occupied, if the suit had been brought in his name. *Lovel v.*

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Everton, 11 Johns. 52. The note having been delivered to the plaintiff, indorsed in blank, the plaintiff had a perfect right to fill up the indorsement to himself, and to sue the note in his own name. **Dean v. Hewit**, 5 Wend. 257. **Tolman v. Gibson**, 1 Hill 308. Chit. on Bills 255.

The opinion of the court was delivered by

BENNETT, J. The only question raised in argument by the defendants' counsel is in regard to the right of the present plaintiff to maintain this action, in his own name, as the indorsee of Tappan. It appears, that the note in question was executed by the wife of White, while sole, with one Daniel Cressey, and made payable to Weare Tappan or order, and that it was indorsed in blank by him. No objection is raised, or can be, against the action, upon the ground that the plaintiff has no beneficial interest in the note, but simply that of a trustee. If he has the legal interest in the note, that is sufficient; and if he recover, it is for the use of Tappan.

It is said, however, that as Cressey, the other signer, had been prosecuted in the courts of New Hampshire by one Atkins, and a recovery had against him as one of the signers of the note, by means of the blank indorsement, no recovery can now be had against the present defendants, by this plaintiff, by force of that indorsement. Although it is not expressly stated, in the bill of exceptions, that the note in question was the *joint* and *several* note of Cressey and Mrs. White, yet it is so described in the plaintiff's declaration, which is a part of the case; it has been so treated in argument; and we are inclined so to treat it in considering the case.

The effect of the judgment against Cressey is only to extinguish the holder's claim on the note itself against him; and it does not affect the liability of the other signers. If a claim be satisfied as to any, it is satisfied as to all; but it may be extinguished as to some of the parties, and remain entire as to others. 1 Steph. N. P. 936. The result of this principle is, that the holder's remedy against Mrs. White and her husband is upon the note alone.

It appears from the case, that Atkins never had any interest in the note; but it was indorsed by Tappan in blank, and the recovery was had on the note against Cressey in Atkins' name for the benefit of Tappan. A note indorsed in blank is, in legal effect, payable to

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bearer; and as this note was indorsed by Tappan for the mere purpose of collection, if it had come back into his hands without any judgment on it against Cressey, he might have stricken out the indorsement and have recovered on the note in a joint action against both. *Dugan et al. v. United States*, 3 Wheat. 182. *Bank of Utica v. Smith*, 18 Johns 230. In this case, the note being merged in the judgment against Cressey as to him, no joint action could be maintained on the note; but as the note is joint and several, the action might well be brought on the note against Mrs. White and her husband. If the holder chose not to erase the indorsement, it is still, in legal effect, a note payable to bearer as to Mrs. White; and if Tappan transmitted the note to the plaintiff for collection, with the blank indorsement unerased, a power was thereby conferred upon him to institute a suit on it in his own name, though for the use of Tappan. The power of the blank indorsement was spent only as to Cressey, by means of the judgment in New Hampshire; and as the note is the several note of Mrs. White, as well as the joint note of both signers, the indorsement may well be regarded as the indorsement of two several notes; and the same incidents must attach to the indorsement, as would have resulted, in case there had been two several notes.

Judgment affirmed.

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JOSHUA SAWYER AND GAMALIEL TAYLOR v. LEVI B. VILAS.

Audita querela will lie to set aside an execution wrongfully issued against the body of the execution debtor.

A judgment is a contract, within the meaning of section sixty three of chapter twenty eight of the Revised Statutes; and an execution, obtained in an action of debt upon a judgment rendered since the first day of January, A. D. 1839, cannot legally issue against the body of the debtor.*

*Where, on a promissory note signed by a citizen of New Hampshire, and executed subsequent to Jan. 1, 1839, a writ was issued and served on the defendant, in this State, by arresting his body, and afterwards, and before final judgment was rendered in the suit, the defendant became a resident citizen

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Where *audita querela* was brought to set aside an execution in such case, and the case was tried in the court below upon a statement of facts, agreed to by the parties, and the original writ and execution against the complainants were referred to and made part of the case, wherein the complainants were described as residing in this State, it was held, that this was sufficient to show, in the absence of all rebutting testimony, that they were resident citizens of the State, within the meaning of the statute, at the time the execution issued.

If the defendant in the *audita querela* would claim, that the execution issued upon an affidavit, within the *proviso* to the statute, he must show that fact affirmatively.

But where one summoned as a trustee was adjudged chargeable, subsequent to January 1, 1839, by reason of a note which he had executed to the principal debtor prior to that date, and the plaintiff in the trustee process commenced an action on the case against the trustee, pursuant to the statute, to recover from him the amount for which he was held chargeable, it was held, that the execution obtained in the latter suit was properly issued against the body of the trustee. *Clark v. Trombly et al.*, Franklin Co., 1845, cited by BENNETT, J.

AUDITA QUERELA, brought to set aside an execution issued by a justice of the peace, against the bodies of the complainants, in an action of debt on judgment in favor of the defendant against them. Trial by the court,—ROYCE, J., presiding,—upon a case stated.

The facts agreed to were substantially as follows: On the 19th day of January, 1838, the complainant Sawyer, being then committed to jail in the county of Lamoille on an execution in favor of the defendant, Vilas, executed a jail bond jointly with the complainant Taylor. Sometime in the year 1838 there was a breach of the bond, and it was duly assigned to Vilas, and he commenced an action thereon and recovered judgment against the complainants, subsequent to the first day of January, 1839. An action of debt was subsequently commenced upon this judgment, and judgment was rendered therein against the complainants, and an execution was issued

of this State, and resided here at the time execution issued, it was held by REDFIELD, J., that the execution could not issue against the body of the defendant; and the execution having so issued, and the defendant having been arrested and imprisoned upon it, it was ordered, on *habeas corpus* brought, that he be discharged. *In re Wallace*, Windsor Co., 1847.

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against their bodies, and they were arrested thereon ;—which is the execution now sought to be set aside. The execution and the original writ in the action were made part of the case stated ; and in them the complainants were described as residents of Hyde park, in the county of Lamoille.

The court rendered judgment for the complainants. Exceptions by defendant.

S. Wires and *Wm. W. White* for defendant.

1. Is the prior judgment in this case to be regarded as a contract, within the meaning of chapter 28, section 63, of the Revised Statutes ? A contract is defined by Blackstone and Kent to be “an agreement, upon sufficient consideration, to do, or not to do, a particular thing.” 2 Bl. Com. 446. 2 Kent 450. The latter author adds, “The agreement is either under seal, or not under seal. If under seal it is denominated a specialty; and if not under seal, an agreement by parol.” Nothing is said of judgments. Ch. J. Marshall says, “A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing.” 4 Wheat. 197. We do not, however, deny, that judgments, for want of a more appropriate appellation, are sometimes classed under the head of contracts. In Story on Contracts, p. 1, a contract is said to be, “a deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act.” The same author adds, “In its widest sense it includes records and specialties; but the term is usually employed to designate only simple, or parol, contracts. This is strictly the legal signification of the term contract.” A judgment is defined to be “the sentence of the law, pronounced by the court upon the matter contained in the record.” 3 Bl. Com. 395. Jac. Law Dict., Judgment.

The legislature took the precaution to limit the change, in the method of collecting debts, to debts thereafterwards contracted ; and to give to the term “contract,” as used by them in the statute, its *widest* sense, instead of that in which it is usually employed, would defeat their manifest intention. 1 Kent 462. It is believed, that this statute has received the construction, claimed by the defendant, in the case of *Clark v. Trombly et al.*, Franklin Co., 1845, and not yet reported. See, also, *Wyman v. Mitchell*, 1 Cow. 316.

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2. The declaration and proof do not entitle the plaintiffs to the relief sought;—1, Because it is not alleged, or proved, that, at the time the judgment complained of was rendered, or when the execution was issued thereon, the plaintiffs were resident citizens of this State;—2, Because it is not alleged, or shown, that, at the time the defendant prayed out his writ of attachment, he did not file with the authority signing the same such an affidavit, as would entitle him to a *capias*.

Poland for plaintiffs.

The original debt on the jail bond became merged in the judgment obtained upon it; and after that judgment was obtained, it was the only evidence of indebtedness, which the defendant had; and this, the complainants insist, was a matter of contract, within the meaning of the statute. *Beckwith v. Houghton*, 11 Vt. 602. Thomp. St. 22. PRENTISS, J., *In re Comstock*, 5 Law Rep. 163.

The opinion of the court was delivered by

BENNETT, J. The important question, presented for our determination, in this case, relates to the regularity of the execution issued against the complainants. If the execution was wrongfully issued against their bodies, they should succeed with their *audita querela*.

The statute provides, that no person, who is a resident citizen of this State, shall be arrested upon an execution, issued upon a judgment recovered in an action founded upon a contract, *express* or *implied*, made or entered into since the first day of January, A. D. 1839. Judgments are frequently classed by legal writers under the head of contracts. Story, in his treatise on contracts, p. 2, makes three classes, one of which consists of contracts of record, such as judgments, recognizances, and statutes staple. Blackstone, in his commentaries, vol. 3, p. 160, says, it is a part of the original contract, entered into by all mankind, who partake of the benefits of society, that they will submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member; and that therefore whatever the laws order any one to pay becomes instantly a debt, which he hath before hand contracted to discharge.

Though the term "contract" is usually employed to designate

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either specialty or simple contracts, yet custom has affixed to the term all species of obligation; and in *Sturges v. Crowninshield*, 4 Wheat. 122, Ch. J. Marshall has defined a contract to be "an agreement, in which a party undertakes to do, or not to do, a particular thing." In this definition the consideration is omitted; and it was no doubt intended to embrace all kinds of contract, whether by record, specialty, or parol. Judgments have frequently been held to be contracts, as constituting claims for a set-off, under statutes which provide only for a set-off of claims founded on contract.

The effect of a judgment is a merger of the original cause of action, upon which the suit is founded, whether it be in tort, or contract; and in either case the judgment constitutes a debt, with the same incidents, in the one case, as in the other. The words of the statute are as broad, as they well can be. The statute provides against the imprisonment of the body upon any execution, issued upon a judgment recovered in an action founded upon a contract, *express*, or *implied*.

We think, then, as the judgment was obtained since the first day of January, 1839, upon which the action was founded, wherein the judgment was recovered, upon which the execution, now sought to be set aside, was issued, that it is a case within the purview of the statute, and that the complainants were not liable to imprisonment.

It has been argued for the defendant, that it does not appear, that the complainants were resident citizens of the state. I apprehend this was not made a ground of objection in the county court. It is to be remarked, that this case comes to this court upon exceptions to the decision of the county court upon a case agreed upon; and, though it is not expressly stated, in the body of the agreement, that Sawyer and Taylor were citizens of this state, yet the original writ and the execution sought to be set aside are made a part of the case, and in both they are set up as resident citizens of the state. If this was a false description, it should have been shown to have been so. We are not to intend it, in order to reverse a decision of the county court.

It is also said, that it does not appear, but that an affidavit had been filed, under the *proviso* to the statute, which would have entitled the plaintiff to a *capias*. It may be answered, that it does not appear that one was filed. If the plaintiff claimed any benefit from the *proviso*, he must have brought himself within it.

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We have been pressed in the argument with the case of *Clark v. Trombly et al.*, decided in Franklin County in 1845 and not yet reported,—which the defendant's counsel claim should govern this case. I was not present at the hearing of that case; but, as I understand it, it was an *audita querela* to set aside an execution. The facts were briefly these. Trombly and Saxe had brought an action against one Uzziel Clark, as principal debtor, and Thomas Clark, as trustee. Clark had been adjudged the trustee of the principal debtor, subsequent to the first day of January, 1839, by reason of a note, which he had executed to him prior to that time, and the trustee had neglected to pay to the officer, who had the execution against the principal debtor, the sum for which he was adjudged trustee. Trombly & Saxe then brought their action on the case, under the 37th section of chapter 29 of the Revised Statutes, against the trustee, Thomas Clark, for his neglect in not paying the sum, for which he was adjudged trustee, and, having recovered judgment, execution issued against the body of the trustee; and the *audita querela* was brought to set that execution aside. The object of the trustee process is to attach the goods and chattels, and rights and credits, in the hands of the trustee, belonging to the principal debtor. The effect of the adjudication, that the trustee is chargeable, is to create a *lien* on the effects in the hands of the trustee, belonging to the principal debtor; and the court determine the amount, which the trustee shall pay on the judgment against the principal debtor. If he neglects to pay, the statute gives the remedy by an action on the case. So far as the trustee pays, so far he is discharged on the claim due from him to the principal debtor; but no farther. The judgment, simply, that he is chargeable, has no effect to discharge him. I think the judgment, that the trustee is chargeable, merely operates to bind the effects in the hands of the trustee by the attachment; and that it does not constitute a contract between the attaching creditor and the trustee. If the trustee neglects to discharge this *lien*, thus gained by the attaching creditor, the statute provides the only remedy given, which is by an action on the case. This action, thus given by the statute, can not, I think, be said to be founded upon a contract, express or implied; and of course the execution was properly issued against the body.

The result is, the judgment of the county court, setting aside the execution, is affirmed.

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THOMAS TAYLOR v. ANDREW FRENCH.

Under the statute of Nov. 11, 1807, the collector of a particular land tax must have caused his return of his proceedings to be recorded in the town clerk's office within thirty days after completing his sale, whether the vendue was dissolved on that day, or not.

Where the sale was made August 24, 1829, and the collector then adjourned the vendue to October 5, 1829, and the return showed, that on that day the vendue was opened and was dissolved, the collector finding that all the land had been sold and no mistakes made, and the collector made his return to the town clerk's office October 16, 1829, it was held, that the proceedings were fatally defective.

It is also required, under that statute, that the return of the proceedings of the collector should be signed by him. Where the record showed a return of the sale, then a minute of the adjournment of the vendue, and then a minute, that, it being found, at the time to which the vendue was adjourned, that all the land was sold and no mistakes made, the vendue was dissolved, and the collector signed the minutes of adjournment and dissolution only, it was held, that this could not be considered a signing of the anterior proceedings and that the defect was fatal.

Where the advertisements of the collector and committee were recorded at length in the town clerk's office, and there was a statement, following the record of each, that the same was inserted in a certain newspaper, giving the title, volume, number and the place where published, but these statements were not signed by any person, but, following the record of all the advertisements, there was a certificate, signed by the town clerk, stating that he had received the foregoing advertisements for record and had recorded the same, it was held, that this certificate could not extend to the statements as to the publication, and did not show, that the town clerk received from the collector the newspapers themselves, in which the advertisements were published, and that the defect was fatal.

EJECTMENT for land in Elmore. Plea, the general issue, and trial by the court,—ROYCE, Ch. J., presiding.

On trial the plaintiff claimed title to the land in question by virtue of a vendue deed from Jonathan Bridge, collector of a tax of four cents per acre on the lands in Elmore, granted by the legislature of Vermont in the year 1827, and gave in evidence the record of the collector's proceedings, the rate bill, the collector's bond and the allowance of the account of the committee. The record offered contained

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what purported to be the collector's return of his sale, made on the twenty fourth day of August, 1829, which was not signed, but was followed by a minute, in these words ;—"This vendue is adjourned to the first Monday of October next, at ten o'clock, at this place : (*signed*) Jonathan Bridge, Collector." Then followed, upon the record, a minute in these words ;—"Elmore, October 5, 1829. The vendue was opened at the time and place, according to the adjournment, and find that the delinquents' lands are all sold, and find no mistakes in the proceedings; therefore dissolved said vendue; (*signed*) Jonathan Bridge, Collector." The certificate of the town clerk then followed, and was in these words ;—"Received, Elmore, Oct. 16, 1829, the foregoing vendue for record and recorded the same; Attest, Martin Elmore, Town Clerk." The advertisements of the committee and collector were recorded at length, and there followed each advertisement a statement, not signed by any one, that the same had been inserted in a newspaper, stating the name of the paper, the volume, number, date, and where printed; and at the end of all the advertisements was a certificate in these words ;—" Received, Elmore, Oct. 16, 1829, the above and foregoing eighteen advertisements for record and recorded the same from page 42 to page 50; Attest, Martin Elmore, Town Clerk."

The defendant objected to the sufficiency of the record, and the court sustained the objections and rendered judgment for the defendant. Exceptions by plaintiff.

Ferrin and Poland for plaintiff.

1. It is objected, that the collector did not return his warrant and proceedings, for record, within thirty days after completing his sale. This question turns entirely upon the legality of the adjournment. The statute does not expressly give the collector any power to adjourn his sale for any purpose; but this has been so universally practised, without objection, that we presume it will be treated as settled, that they possess the right and power to adjourn, when necessary. In this case the record does not show for what reason the vendue was adjourned; but the plaintiff insists, that the doctrine, applicable to the conduct of all persons acting officially, applies in this case, that the presumption is in favor of the due execution and performance of their duty. *Rex. v. Catesby*, 2 B. & C. 814; [9 E.

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C. L. 264.] *Rex v. Morris*, 4 T. R. 550. *Rex v. Hinckley*, 12 East 361. *Rex v. Bestland*, 1 Wils. 128. *Rex v. Long Buckby*, 7 East 45. 9 Cow. 110. 14 Mass. 145-148. *Brown v. Wood*, 17 Mass. 68. *Stembey v. Shafter*, 11 Johns. 513. 3 Pick. 281. *Adams v. Jackson*, 2 Aik. 145. 1 Cow. & Hill's Notes, 304, 305. *Mead v. Mallet et al.*, 1 D. Ch. 239.

2. It is also objected, that the advertisements of the collector and committee are not severally certified by the town clerk to be true records, &c. The statute requires no formal certificate of the title, volume, &c., of the newspaper to be appended to each advertisement. *Spear v. Ditty*, 8 Vt. 419. *Belows v. Elliott et al.*, 12 Vt. 569. *Isaacs, Adm'r v. Shattuck*, 12 Vt. 673.

S. A. Willard for defendant.

1. The record is not accompanied with sufficient certificates, to show in what newspaper each advertisement was inserted, the volume, number, date, and place where printed. The statement at the end of each advertisement does not appear to be official, and is insufficient. The town clerk's certificate, at the end of all the advertisements, cannot be extended to what is not expressed therein, and must therefore be confined to the recording the advertisements. It does not prove what the record was made from.

2. The statute required, that the collector, within thirty days after completing the sale of any township, should cause his warrant and return of his proceedings, by him signed, to be recorded in the proper office for the recording of deeds of land in said township, &c. In this case the land was all sold on the 24th of August, and the proceedings were not returned until the 16th of October after. This defect is sufficient to vitiate the whole matter.

The opinion of the court was delivered by

BENNETT, J. In the argument several objections are made against the validity of the title under Bridge's vendue, a portion only of which it is necessary to consider.

The twelfth section of chapter 86 of the Revised Statutes* re-

* Which is in the words of the statute of Nov. 11, 1807, [Sl. St. 665;] under which this vendue was held; and this latter statute was copied from the statute of Nov. 5, 1799, [2 Tolm. St. 298.]

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quires, that every collector of land taxes shall, within thirty days after completing the sale of any township, cause his warrant and a return of his proceedings, by him signed, to be recorded in the proper office for recording deeds of lands in such township. It appears from the records, that the sale of all the lands of delinquents was made on the 24th day of August, 1829; though the collector, for some cause not apparent upon the record, adjourned the vendue until the 5th day of October next ensuing. The proceedings of the collector were not returned to the town clerk for record until the 16th day of October, 1829,—more than thirty days from the completion of the sales. On the 5th day of October, 1829, the record shows, that the vendue was opened at the time and place according to adjournment, and that the collector, finding all the lands of delinquents sold, and no mistakes, adjourned the vendue without day. The record then shows affirmatively, that the sales were all completed on the 24th day of the preceeding August.

It is said, that the collector had power to adjourn the vendue, and that therefore the thirty days should commence runing from the time it was adjourned without day. Vendue sales for land taxes are proceedings *in invitum*; and we have always required a strict compliance with the statute requisites. The statute is, that the return shall be made within thirty days after completing the sales. To hold that this means thirty days from the time the collector shall see fit to adjourn the vendue without day, though the sales may have been completed long before, is a perversion of language. The statute can have but one meaning. The time must commence running, when the sales are all completed; and it matters not when the vendue shall, in form, be finally dissolved.

In *Mead, Adm'r, v. Mallet et al.*, 1 D. Ch. 239, the court say, the return must be made within thirty days from the time the collector closes his vendue, or no title is acquired under such vendue. That case shows that the vendue closed more than six months before the return was made; but whether the vendue was closed on the same day the sales were completed does not appear from the case, as reported; and in that case it was of no particular importance. So far as this question is concerned, when the sales are all made and the business completed, the time must begin to run. In the case in Chipman the court say, that, "to hold the sales void, unless the

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proceedings are returned within the *thirty days*, has been the uniform construction of the act, ever since it was passed," (1799,) and that on the faith of this construction numerous estates in land have been bought and sold and were then holden, and that it would be productive of great injustice to disturb it. This construction having become a rule of property, it should not be changed without an imperious necessity, whatever we might think of it, were it *res integra*.

The statute also requires the return of the proceedings of the collector to be by him signed. There is a failure to comply with the statute in this particular. The collector, having simply signed his name to the two adjournments, it cannot be considered as a signing of the anterior proceedings. It in no way professed to be so. This objection must also be fatal to the validity of the vendue.

It is also made the duty of the collector, within one year after the time appointed by him for the sale of lands, to present at the office, where the proceedings of his sale may be recorded, all the newspapers respecting the lands so sold; and it is made the duty of the clerk to record the advertisements at length, and the title, volume, number and date of the papers, in which they are inserted, and the place where such paper was printed. It appears, that following each advertisement there is a simple statement, that the same was inserted in a certain newspaper, giving the title, volume, number, date, and place where published; but none of the statements are verified by any signature, either private, or official. All that we have, on this point, is at the end of the whole record, where the town clerk of Elmore, on the 16th day of October, 1829, certifies, "that he then received the above and foregoing eighteen advertisements for record and recorded the same from page 42 to page 50," and attests the same.

It is evident, that this certificate must be confined to the recording of the advertisements, and cannot extend to the statements in regard to their publication. It does not profess to extend any farther. Neither does the certificate of the town clerk state that he received of the collector the newspapers themselves, in which the publications were made, and that he made the record of the advertisements, &c., from the papers themselves. We think the title under the vendue defective, also, for these reasons.

The result is, the judgment of the county court is affirmed,

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CHITTENDEN,
DECEMBER TERM, 1846.

PRESENT,
Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. MILO L. BENNETT,
Hon. DANIEL KELLOGG, } ASSISTANT JUDGES.
Hon. HILAND HALL,

JEHIEL SMITH v. WILLIAM S. HYDE.

While the plaintiff was attending, as a physician, upon the father and mother of the defendant, under a contract with the father, that, "if there was no cure there should be no pay," the defendant executed to the plaintiff a writing, by which he agreed to be "holder" to the plaintiff "for the payment of his bill for medicine and attendance" upon his father and mother. And it was held, that the undertaking of the defendant was collateral, merely, to the contract between his father and the plaintiff.

In such case parol evidence is admissible to prove the terms of the original agreement between the plaintiff and the principal debtor, and to show that the plaintiff has never complied with the terms, so as to acquire a right of action against the principal debtor;—and if this fact be established, the plaintiff can maintain no action upon the guaranty.

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If a physician commence attending upon a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services, or medicines, unless he show a performance of the terms of the contract upon his part.

If the liability of the defendant is only collateral to that of another person, the action on book account cannot be sustained against him.

Book Account. Judgment to account was rendered in the county court, and an auditor was appointed,—the substance of whose report is sufficiently detailed in the opinion delivered by the court. The county court, September Term, 1845,—BENNETT, J., presiding,—rendered judgment *pro forma* upon the report for the defendant. Exceptions by plaintiff.

J. McM. Shafter for plaintiff.

A. Peck and H. Leavenworth for defendant.

The opinion of the court was delivered by BENNETT, J. The plaintiff seeks to recover of the defendant for services rendered and medicine furnished in doctoring the parents of the defendant. From the report of the auditor it appears, that the plaintiff commenced his attendance upon the defendant's father, who had been sick many years, on the second day of December, 1843, under a stipulation between the plaintiff and the patient,—to borrow the language of the report,—“that if there was no cure, then there should be no pay.” The defendant was present, when this stipulation, as it is called, was entered into. It seems, that the plaintiff, under this stipulation, continued to attend the father until the sixteenth day of December, making him some four or five visits, without anything being farther said upon the subject. On that day the auditor reports that the plaintiff represented the propriety of having a writing from the defendant, as the father was poor. The son then gave one, of that date, of the following tenor; “I hereby agree, that I will be holden to Doct. J. Smith for the payment of his bill for medicine and attendance upon my father and his wife.”

The report finds expressly, that when the plaintiff made his first visit to the defendant's father, the father agreed with him to pay for

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the doctoring upon the principle of "*no cure, no pay.*" The declaration of the father, that he would give a cow to be cured, and of the son, that he would give all that he was worth to have his father cured, can be considered as only casual remarks, expressive of the deep interest felt in the matter, and were so regarded by the parties. The auditor has not found, that any special contract was thereby made; and surely none could have been intended. The report finds, that there was not only *no cure*, but that the patient was in fact injured by the treatment of the plaintiff.

The report also finds, that the services charged for doctoring the wife and mother were rendered under a similar agreement and were attended with no beneficial effects.

The plaintiff claims, that the defendant is liable by means of a written contract, and that the auditor erred in the admission of the parol evidence of the character detailed in the report.

The rule of law, that parol evidence is not to be received to control the operation of a written contract, is not to be infringed upon; but in determining this case it is only necessary to inquire what is to be the legal construction of the agreement in question; and the intention of the parties should be our guide in giving it a construction. The plaintiff commenced rendering the services upon the sole responsibility of the father, and at his request, and for his benefit. There is nothing in the case, to show that the father at any time ceased to be liable for any of the services rendered upon the principles of the special contract, "*no cure, no pay.*" While the plaintiff was professedly rendering the services under the special contract, and the business remained inchoate, the defendant gave the writing in question. The inquiry then arises, how is he to be *helden*?

We think the credit of the defendant came in aid of that of his father, and of course is *collateral* to it. The principle is a common one, that if the *whole credit* is not given to the person who comes in to answer for another, his undertaking is collateral, and, under the statute of frauds, must be in writing. *Leland v. Creyon*, 1 McCord 100. 3 Kent 123. The case of *Barber v. Fox*, 2 E. C. L. 386, seems to be a full authority for the construction we are disposed to give the writing in question. In that case the plaintiff had been engaged in the transaction of certain business for one Samuel Fox, for doing which Samuel Fox had advanced a given sum of money;

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and the plaintiff, in the course of the business, informed him, that the money which he had advanced was nearly exhausted, and that he must have some more, or he could not go on with the business; and thereupon the defendant agreed, if the plaintiff would go on with the business, *he would pay him whatever was to be paid.* Yet this was held to be only an undertaking in aid of that of Samuel Fox. In that case, it is to be remarked, the words of the promise are, "*I will pay whatever is to be paid.*" In the case before us the words are, "*I agree that I will be holden &c.*" Certainly the words of the promise, in that case, are more indicative of an absolute and an original undertaking, than in the case at bar.

The obligation of a collateral undertaking being accessory to the obligation of the principal debtor, it is of its very essence, that there should be a valid obligation against the principal debtor. There can be no accessory without a principal; and the accessory obligation must necessarily fall with the principal obligation. The evidence received by the auditor, going directly to show a want of liability on the part of the principal debtor, was properly admitted to defeat a right of recovery on the defendant's collateral undertaking.

As the effect of the agreement is only to render the defendant collaterally liable, the action on book account could in no event be sustained against him.

The judgment of the county court is affirmed.

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SAMUEL S. SMITH v. JOHN KEELER.

In an action on a contract for labor, and on trial on the general issue, a person is incompetent as a witness for the plaintiff, who was jointly concerned with the plaintiff in making the contract with the defendant.

INDEBITATUS ASSUMPSIT for work and labor. Plea, the general issue, and trial by jury, September Term, 1845,—BENNETT, J., presiding.

On trial the plaintiff offered as a witness one Samuel Smith. The defendant objected to his admission on the ground of interest, and

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offered to prove that the work and labor declared for were performed on a contract made by the defendant with the plaintiff and witness jointly. The court declined to hear the testimony so offered by the defendant, and admitted the witness. Verdict for plaintiff. Exceptions by defendant.

J. Maeck, for defendant, contended, that the witness could claim one half of the amount recovered in this suit by the plaintiff, and could use the record to show the fact of recovery, as well as the amount recovered, and was therefore directly interested in the event of this suit; and he cited 2 Stark. Ev. 785; Greenl. Ev. §§ 395, 427; 8 C. & P. 480; 1 Dall. 62; *Ward v. Lee*, 13 Wend. 41; *Clarkson v. Carter*, 3 Cow. 84; *Young v. Bairner*, 1 Esp. R. 103.

J. Carpenter and *Smalley & Phelps*, for plaintiff, claimed, that the witness could in no event be made liable for costs in this case; and that, in other respects, his interest was equally balanced, on the ground that a judgment against the plaintiff would be no bar to a subsequent action in favor of the witness and the plaintiff jointly, against the defendant;—that if the plaintiff recovered, the witness would have one half of the amount,—if the plaintiff did not recover, the witness would have a claim for an equal amount against the defendant,—and in either event he would not be liable for the costs.

The opinion of the court was delivered by

HALL, J. The only question in the case relates to the competency of a witness. To exclude the witness, the defendant offered to prove, "that the work and labor declared for were performed on a contract made by the defendant with the plaintiff and witness jointly;" and we think the testimony should have been admitted.

The legal intendment of the facts offered to be proved must be taken to be, that the plaintiff and defendant were jointly interested in the labor declared for, and consequently in the sum sought to be recovered. The witness was offered in support of the case generally, under the issue of *non assumpsit*; and, upon the state of facts proposed to be shown, he would be directly interested to increase the

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amount of the recovery, inasmuch as he would be entitled to a share of whatever was obtained of the defendant. The plaintiff, if he recovered, would hold the share of the witness in the avails of the judgment in trust for him; and the record of this suit would be good evidence for the witness in a suit against the plaintiff, to show both the fact of the recovery and its amount.

In case the plaintiff in this suit failed to recover, we do not see why the witness would not, *prima facie*, at least, be holden to contribute to the plaintiff towards the payment of the costs; in which case the record in this suit would be evidence of their recovery and amount. *Jackson v. Galloway*, 8 C. & P. 480. 2 Stark. Ev. 484-5. 1 Greenl. Ev. §§ 390, 427. *Pike v. Blake*, 8 Vt. 400. *Pinney v. Bugbee*, 13 Vt. 623.

The witness having been admitted, notwithstanding the offer to show his interest, we think there is error in the judgment of the county court, and that a new trial should be granted.

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EPHRAIM MILLS v. ARCHIBALD W. HYDE.

Where a note, signed by three as joint principals, has been renewed from time to time and paid in part, and then renewed for the balance by the note of two of the signers, the fact, that the note first given and the renewed notes were left in possession of one of the two, furnishes no presumptive evidence that the amount paid upon the notes was paid by him. After a number of years have been suffered to elapse without claim, the presumption would rather be, that the matter was adjusted between the parties at the time.

One of two joint contractors, having paid the whole debt, may sustain his action for contribution against his co-contractor, notwithstanding the statute of limitations had run upon the claim at the time the payment was made.

Where one of several joint contractors pays the whole debt, he may, in an action at law against a co-contractor for contribution, prove the insolvency of any of the other joint contractors, and recover an aliquot part of the whole debt, having regard only to the number of solvent contractors.

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In this case both parties having taken exceptions, and the judgment of the court below having been affirmed, no costs of this court were allowed to either party.

INDEBITATUS ASSUMPSIT for money paid. Pleas, the general issue and the statute of limitations, and trial by the court. September Term, 1845,—BENNETT, J., presiding.

On trial it appeared that the plaintiff and defendant and one Moore, on the twenty eighth day of November, 1833, executed a promissory note to the Branch Bank of the United States, at Burlington, for one hundred dollars, payable in sixty days; upon the face of which they appeared as co-principals. This note was renewed from time to time, until the twenty fourth day of September, 1835, when the plaintiff and defendant executed their own note to the bank for seventy six dollars and thirteen cents,—the balance having been paid. The original note and all the renewed notes were in the hands of the plaintiff, and were produced by him upon the trial. There was no evidence to prove who made the payment reducing the original note to \$76.13, other than what might arise from the fact that the plaintiff had all the notes in his possession. Moore was insolvent at the time this action was commenced, and had been so for several years. On the sixteenth day of January, 1843, the plaintiff paid to the assignee of the bank the amount due upon the note executed September 24, 1835. This was more than six years after the date of the note, and there was no evidence to show that it had been taken out of the operation of the statute of limitations.

Upon this evidence the county court decided that the plaintiff was entitled to recover one half of the amount paid by him upon the last note, and interest from the time of payment. Exceptions by both parties.

Asahel Peck for defendant.

1. At the time the last note was paid by the plaintiff, the statute of limitations was a perfect legal protection to both parties, and each had a right to judge whether he would avail himself of this defence. It was not competent for the plaintiff to waive this defence, by payment of the debt, and thereby create a new duty, or impose a new legal obligation upon the defendant. Chit. on Cont. 592, n. *Randolph v. Randolph*, 3 Randolph 490. *Skillic v. Merrill*, 16 Mass.

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40. *Dawes v. Shed et al.*, 15 Mass. 6. *Wright v. Butler*, 6 Wend. 284.

2. If the plaintiff is entitled to recover, the recovery ought to be limited to one third of the amount of the last note, there being no evidence who made the prior payment. As the case is stated, it must be taken that the three were co-principals; and at law contribution is apportioned according to the number and character of the parties, whether principals, or sureties, regardless of their solvency, or insolvency. *Browne v. Lee*, 6 B. & C. 689, [13 E. C. L. 294.] *Cowell v. Edwards*, 2 B. & P. 268. 1 Steph. N. P. 319. It can make no difference, that the last note was signed by Mills and Hyde only. It was a mere substitute for the former note; and, as between themselves, it still remained the duty of Moore to pay one third, equally as if he had signed it.

C. Adams for plaintiff.

1. The debt to the bank was the joint debt of the plaintiff and defendant; and, as between themselves, each was bound to pay one half. The payment by one of his half, or of any portion less than half, created no right of action against the other. If this be correct, the payment by the plaintiff, on the 24th of September, 1835, of the balance of the original note, above \$76,13, gave him no claim against the defendant. But it had this effect, that, as to *so much*, contained in the \$76,13 note, the defendant stood as principal and the plaintiff his surety, and they were jointly holden for the balance.

2. The statute of limitations is no bar to the plaintiff's claim for paying the last note. Although he might have pleaded the statute to the claim of the bank, he was not obliged to do so; and having paid the debt, his claim is good against the defendant therefor. *Mauri v. Heffernan*, 13 Johns. 58.

The opinion of the court was delivered by

HALL, J. It is claimed in behalf of the plaintiff, that his possession of the old notes of Moore, Mills and Hyde is presumptive evidence, in the absence of all other proof, of the payment by him of part of the original debt previous to September 24th, 1835, and that the fact ought to have been so found. We are satisfied the judgment is right in this respect. If the notes were not destroyed at the time

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they were taken up, they must necessarily have passed into the hands of some one, and it is not seen why the possession of them by the plaintiff is not as consistent with the supposition that the payment was made jointly by the plaintiff and defendant, as with the idea that it was made solely by the plaintiff. After such a lapse of time, without any claim by the plaintiff, the presumption would rather seem to be, that the matter was made right between the parties at the time. But if the payment had been proved, it is at best doubtful, whether the statute of limitations, which is pleaded in this case, would not have been a bar to any recovery for it. *Davies v. Humphreys*, 6 Mees. & Welsb. 152.

On the part of the defendant it is insisted, that more than six years having elapsed after the note, given by the plaintiff and defendant in 1835, became due, before its payment by the plaintiff in 1843, the statute of limitations had become a bar to its recovery by the bank ; and that therefore the payment of the note by the plaintiff is to be deemed voluntary, without any implied request by the defendant.

It is doubtless true, that, in order to entitle a party to contribution in cases of this description, the payment must have been made upon a contract for which the defendant remained liable. Was the payment so made in this case ? It was held in *Joslyn v. Smith*, 13 Vt. 353, that successive payments made on a note by the principal, after the money became due, there not having been six years between any two of the payments, revived the debt against the surety for six years from the last payment. And at the last term of this court in Washington county [*Wheelock et al. v. Doolittle et al.*, 18 Vt. 440,] it was held, that, a new promise, made by one joint debtor after the lapse of six years, renewed the debt against both. These cases proceed upon the ground of a presumptive agency in one joint contractor to bind the whole ; so that the act of one, in this respect, is the act of all.

As an acknowledgment of the existence of the debt to the bank, made by the plaintiff in 1843, would have rendered the defendant liable, the consequence seems necessarily to follow, that the plaintiff might pay the note and call on the defendant for contribution. In the former case the act of the plaintiff would render the defendant liable for the whole debt ; while in the latter his liability would

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be only for a part; and where one joint contractor verifies his sense of the justice of a claim by actual payment, relying only on his remedy for contribution, there is certainly much less danger of fraud upon the co-contractor, than where he merely acknowledges a liability, which might not ever be enforced against him. We therefore think that the payment made by the plaintiff in 1843 was upon a valid debt, and that he is entitled to contribution.

It is farther insisted, on the part of the defendant, that, as the debt was originally the joint debt of three, the plaintiff was only entitled to recover *one third* of the sum paid, instead of *one half*.

If the giving of the new note by the two, in 1835, be considered as a payment of the original debt, as against Moore,—and the case of *Lapham v. Barnes*, 2 Vt. 218, seems to favor this view,—then the payment by the plaintiff may well be treated as having been made on the joint liability of the two; in which case the plaintiff should undoubtedly recover a moiety.

But we are satisfied, that the insolvency of Moore ought to entitle the plaintiff to a moiety of the sum paid, admitting Moore to have been a co-contractor with the other two. It is conceded to be the settled rule in chancery, to decree contribution equally among all the solvent contractors, excluding from the computation the share of any co-contractor who is insolvent. *Peter v. Rich*, 1 Ch. R. 34. *Deering v. Earl of Winchelsea*, 2 B. & P. 270. 1 Story Eq., sec. 496. But in *Cowell v. Edwards*, 2 B. & P. 268, it was said by the court, that, *at law*, a co-surety could only recover an aliquot part of the whole sum paid, having regard to the number of the sureties; though it was admitted, that, if the insolvency of any of the other sureties were made out, a larger proportion might be recovered in a court of equity. It may be observed, that the question now under consideration did not arise in that case. There were there six sureties, and the plaintiff having obtained a verdict against one of them for a sixth part of the sum paid, the defendant moved to set it aside, and insisted that an action at law for a contribution between cosureties did not lie, at least until the insolvency of the other contractors was shown. The counsel for the plaintiff, in arguing against this motion, was stopped by the court; and then the intimation above stated was given. So that, in reality, nothing was decided, but that an action for contribution in such case might be sus-

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tained, without proving the insolvency of the principals. The intimation of the court has, however, been cited as law by some of the elementary writers; and the point was afterwards (in 1828) decided in *Browne v. Lee*, 6 B. & C. 689. But in neither of these cases is any reason given, why the recovery should be different at law, from what it is in chancery; and the reason is certainly not very apparent.

In *Cowell v. Edwards* Lord Eldon intimated a doubt, whether, where there are more than two solvent sureties, the action ought to be maintained at law, because of the complicated character of the transaction and of the multiplicity of suits it might occasion. There is something tangible in this intimation; and if it had been acted upon, it would not have been without some strong show of reason. But when this difficulty is overcome, and one of any number of co-sureties is allowed to recover at law, it is not easily seen why he should be entitled to a less sum than in a court of equity. There is nothing in the fact, proposed to be shown to increase the amount of the recovery, that seems unfit for the consideration of a court of law. The fact of the insolvency of a co-contractor may as well be inquired of by a jury, as by a chancellor, and, indeed, is a fact which appears peculiarly suitable for the determination of a jury.

It is not found, that this question has been directly decided in this country, except in New Hampshire; where it is held, that the insolvency of one of three sureties may be shown at law, and that in such case one, who has paid the whole debt, may recover a moiety of the other solvent surety. *Henderson v. McDuffee*, 5 N. H. 38. This decision is, however, rested principally on the fact, that there is no court of chancery in that state.

The liability of co-sureties and joint contractors to each other is said not to be founded on contract, but to be the result of the fixed principle of justice, that those, who have a common interest and benefit, ought to share in the common burden; *Deering v. Earl of Winchelsea*, 2 B. & P. 270; *Fletcher v. Grover*, 11 N. H. 368; and it is on the ground of an equitable obligation to pay money, that the law raises an implied promise of contribution. The equitable obligation to share in the loss occasioned by the inability of one co-surety to contribute is just as strong, as that which arises on the failure of the principal to pay; and the promise may as well be implied in the one case, as the other.

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There is something very nearly bordering on absurdity in saying to a joint contractor, who has removed the common burden, that he may have his remedy either in a court of equity, or a court of law, but that, if he sues in chancery, he may recover his whole claim, whereas, if he bring his suit at law, he shall recover only a part. The action for money paid is an equitable action ; and when a plaintiff has paid money for the benefit of a defendant, he ought not unnecessarily to be driven out of a court of law. We see no objection to administering the same justice in this case, that we would if sitting as chancellors. The plaintiff having paid the share of Moore, who is hopelessly insolvent, the defendant ought to bear with him the burden thus imposed upon him.

The judgment of the county court is therefore affirmed ; but without costs of this court to either party,—both parties having excepted, and the exceptions of neither having prevailed.

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GEORGE A. ALLEN v. JOHN CARTY, JAMES CARTY, PATRICK CARTY AND THOMAS CARTY.

The liability of the receptor of property attached, upon his receipt, depends upon the liability of the officer who took the receipt. If the execution is delivered to another officer, and the property is demanded of the attaching officer in season to charge him, it is not necessary that it should also be demanded of the receptor within the thirty days.

Where the term of court, at which a party recovers final judgment, ends on Saturday, Monday is the first day on which the party is entitled to take out execution ; and that day is to be excluded in the computation of the thirty days, within which property, attached on the original writ, must be demanded of the attaching officer by the officer holding the execution, in order to charge the property.

In an action upon a receipt for property attached, a deputy sheriff, to whom the execution was delivered, is a competent witness to testify that he made a reasonable demand of the property of the officer who made the attachment.

When a portion of the property attached and received has been withdrawn from the custody of the receptor in such manner as to discharge his liability.

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ity so far, and the value of all the property receipted is expressed in the receipt at one entire sum, the damages, in an action upon the receipt, are to be determined by assuming the value of the whole property receipted to be the sum specified in the receipt, and then ascertaining the just proportion, at that assumed value, which the property retained by the receiptor would bear to the property for which he is not liable.

ASSUMPSIT upon a receipt, executed by the defendants, for property attached by the plaintiff, as sheriff, on *mesne process*. The value of all the property specified as attached was stated in the receipt to be five hundred dollars. Plea, the general issue, and trial by jury, March T. 1845,—BENNETT, J., presiding.

On trial the plaintiff gave in evidence the receipt declared upon, and then offered one Ferris as a witness. It appeared, that at the time final judgment was rendered in the suit in which the attachment was made, the plaintiff had ceased to be sheriff, and Ferris was a deputy under one Gleason, who was then sheriff, and that the execution was delivered to Ferris, as deputy sheriff; and it was offered to be proved by him, that he demanded the property of the plaintiff in due season to charge it in execution. The defendants objected to the competency of the witness; but the objection was overruled by the court, and the witness was allowed to testify.

It appeared, from all the evidence in the case, that final judgment, in the suit in which the property was attached, was rendered by the supreme court at their January Term, 1844, in Chittenden county; that the court adjourned, at that term, on the sixth day of January, 1844, which was on Saturday, and no special order was made as to the time of issuing this or any other execution of that term; that the execution issued of the date of January 8, 1844, and was placed in Ferris' hands on the sixth day of February, 1844; that on the seventh day of February, 1844, Ferris demanded the property of the plaintiff, who did not deliver it, but said he had this receipt; and on the ninth day of February, 1844, the plaintiff and Ferris demanded the property of the defendants. The county court decided, that the execution was issued and the property demanded in season, and that, on these facts, the plaintiff was entitled to recover.

The defendants then proved, that a portion of the property attached, and receipted by them, was actually the property of the plaintiff in the suit in which the attachment was made, and that it

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was subsequently attached by his creditors, while in the hands of the defendants, and sold to pay his debts, and then offered to prove the *actual value* of the residue of the property remaining in their hands, —claiming that to be all that the plaintiff was entitled to recover in this suit. But the court decided, that the rule of damages would be the amount which was fixed in the receipt as the value of the whole property, deducting the *actual value* of that portion of the property which belonged to the plaintiff in the attachment, provided so much should be required to pay the debt, and excluded the evidence.

Verdict for plaintiff. Exceptions by defendants.

C. D. Kasson and A. Peck for defendants.

1. We claim, that, when property attached is received, and the execution is delivered to some other than the attaching officer, the demand should not only be made of the attaching officer, but of the receiptors also, within the thirty days. When the execution is delivered to the officer who made the attachment, a demand of the receiptors, made within the life of the execution, is sufficient; for in such case the privity of contract between the receiptors and officer is sufficient to advertise them of their liability, so long as he remains in office. But when he goes out of office and cannot have the process to take the goods, it seems to be going very far, to require the receiptors to take notice of the doings of other officers, between whom and themselves there is no privity.

2. But we insist, that no demand was made upon Allen within the thirty days, according to any legal mode of computation. It was the plain intention of the statute to bound a period of time, *within* which the property must be taken in execution. The term "*thirty days*" is intended to represent one aggregate period; hence there is as much propriety in counting *Sunday*, as any other day. By comparing sections nineteen and twenty of chap. 28 of the Revised Statutes with section forty one of the same chapter, it is manifest that this was the intention of the law. Again, it is well settled, that, when time is to be computed from an act done, or an event to happen, the day upon which the act is done, or event happens, is to be computed as the first day. *Rex v. Adderley*, 2 Doug. 464. *Castle v. Burdett*, 3 T. R. 623. *Glassington v. Rawlins*, 3 East 407. *Clayton's Case*, 5 Rep. 1. *Osbourne v. Rider*, Cro. Jac. 135. *Bcl*

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lasis v. Hester, 1 Ld. Raym. 280. Co. Lit. 225, lib. 3, §§ 422, 423, and note. *Presbrey et al. v. Williams*, 15 Mass. 193. *Portland Bank v. Maine Bank*, 11 Mass. 205. *Paine v. Webster*, 1 Vt. 135. If, therefore, in this case, the Sundays are to be computed, or if, treating *Monday*, the eighth day of January, as the first day upon which execution might issue, we are at liberty to commence the reckoning on that day, the thirty days expired on the sixth of February.

3. The witness, Ferris, was incompetent from his interest in the particular question. The question was, whether he had seasonably demanded the property of the plaintiff. It involved his own conduct, for which he was officially liable. *Dennison v. Hibbard*, 5 Vt. 496. *Yeuren v. Smalley*, 3 Vt. 251.

4. The rule of damages was erroneous. If property is placed in the hands of receiptors, on the faith of which *entire* property they assume a given amount of liability, we insist that it is equivalent to a warranty of title on the part of the sheriff, or his principal; and the receiptors are not liable beyond the actual amount which they could hold.

D. A. Smalley and E. J. Phelps for plaintiff.

1. Ferris was a competent witness for the plaintiff. There is nothing to take the case out of the general rule, that a mere agent, or servant, may be a witness for his principal. *Eastman v. Hedges*, 1 D. Ch. 101. *Wainwright et al. v. Straw et al.*, 15 Vt. 215.

2. The demand upon Allen and the defendants was made in season to charge them. The case shows a demand upon the defendants within the life of the execution; and it is settled that such a demand is sufficient, provided the execution has been issued and a demand made upon the officer within thirty days after judgment. *Bliss v. Stevens*, 4 Vt. 88. The court adjourned the sixth of January, which was Saturday; Monday, the eighth of January, was consequently the first day, upon which the plaintiff could have an execution. Rev. St. c. 28, §§ 19, 20. Of course thirty days from the eighth of January were allowed to make the demand; and all the authorities tend to establish the principle, that when an act is to be done within a given number of days *from* a day mentioned, the time is computed exclusive of the day mentioned, 2 Cowp. 714. 3 N. H. 93. 4 N. H.

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267. 10 N. H. 182. 15 Mass. 193. 1 Pick. 485. 12 M. & W. 2.

3. The rule of damages adopted by the court below has been settled by this court in *Parsons v. Strong*, 13 Vt. 235.

The opinion of the court was delivered by

HALL, J. Several objections are made to the verdict in this case.

It is urged in the first place, that the plaintiff was not entitled to recover, because the property was not demanded of the receiptors within thirty days from the time of rendering the judgment. Upon this point it is only necessary to say, that the liability of the receiptors, in this respect, depends upon the liability of the officer, to whom the receipt was given. If it turns out in this case, that the creditor's remedy on the sheriff, for the property attached, had become fixed by a timely demand on him, no objection is seen to the sufficiency of the demand on the receiptors.

It is next insisted, that the property was not taken in execution, or, in other words, was not demanded of the attaching officer, within the thirty days required by law. The statute provides, that property attached one *mesne* process shall be holden to respond the judgment thirty days from the time of rendering it; and that the day, on which the plaintiff shall first by law, without leave of court, be entitled to execution, shall be deemed the time of rendering such judgment, for the purpose of holding the property attached. It is also provided by statute, that no execution shall issue on any judgment of the county or supreme court, until twenty four hours after the rising of the court, unless by special permission of the court. Rev. Stat. c. 28, §§ 19, 20, 41. Without inquiring into the time when the twenty four hours is to commence running, it is sufficient, in this case, to say, that as the day succeeding the day of the rising of the court was Sunday, no execution could have issued on that day upon any mode of reckoning, and that consequently Monday, the eighth day of January, must be deemed to have been the day on which the plaintiff could first, by law, be entitled to his execution. The execution appears to have been issued on that day, and here arises the principal question on this part of the case. If the day on which the execution issued is reckoned as one of the thirty days, then the property was not charged in execution by a demand on the sheriff in time, and the lien of the creditor is gone. If, on the other hand, the day

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of issuing the execution is excluded from the computation, the demand on the sheriff was in due time, and the lien is preserved.

The attention of the court has been called by counsel to numerous authorities on this point, both in England and this country; and although they are not by any means uniform, yet their general current seems to tend to establish the rule, that where the computation of time is to be made from the happening of an event, or the doing of an act, the day of the event, or act, is to be included in the computation; but if the time is to be reckoned from a certain *day*, or from a certain *date*, the day from which the time commences running is to be excluded from the computation. Under this rule we are disposed to exclude the day of the issuing of the execution from the computation, as we think the language of the statute is most naturally construed as fixing upon the *day* of the issuing of the execution as the time from which the computation is to be made. This is also in conformity to what is understood to be the law in reference to the computation of the sixty days, within which an execution may be served. The sixty days have been uniformly reckoned to be exclusive of the day of the date; and a common sense view of the subject would seem to be, that the officer should have thirty of those sixty days, in which to charge in execution property attached. No error is therefore found in the ruling of the court in this respect.

It is next insisted, that Ferris was an incompetent witness to prove a demand of the property, on the execution, of the attaching officer, because of his interest in the event of this suit. It is said, if he had neglected to make the demand proved by him, he would be liable to the creditor for his default, and that by testifying to the demand he discharged himself from such liability.

It seems to be conceded, that when the effect of the testimony of a witness would be to discharge him from a direct and immediate liability to one of the parties to the suit, he is incompetent; but in regard to what facts should constitute such liability, there appears to be considerable discrepancy in the cases; and perhaps some of the cases in this state have gone the full length of the English authorities, in excluding the witness. To show that the witness was incompetent in this case, *Yeuren v. Smalley*, 3 Vt. 251, and *Dennison v. Hibbard*, 5 Vt. 496, are relied upon. In both those cases the witnesses were excluded, because, if the facts to which they

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were brought to testify were true, they would be discharged from a liability to the plaintiffs, which liability, if their testimony was false, appeared to be fixed and immediate.

It must be conceded, that these cases bear a strong analogy, in principle, to that now before the court; but in one respect, at least, they differ from it. In those cases the liability of the witness was direct to the party in the suit; in this, the liability, if it exist, is to the sheriff, who is liable to the party. *Hutchinson v. Parkhurst*, 1 Aik. 258. *Ordway v. Bacon*, 14 Vt. 378. In the case of *Clark v. Lucas*, 1 C. & P. 156, which was an action against a sheriff for negligently executing a writ, it was held, that an assistant, employed by the sheriff's officer to execute the writ, was a competent witness for the sheriff, and that the liability of the witness to the sheriff's officer was too remote an interest to exclude him. And the rule seems to be, that the liability, in order to exclude a witness, must be direct and immediate to the party, and that, where the witness is only liable to a third person, who is liable to the party, such circuituity of interest is no legal ground of exclusion. *Clark v. Lucas*, 1 C. & P. 156. *Briggs v. Crick*, 5 Esp. 99. 1 Greenl. Ev. 463, 468. In this case, the witness not being liable directly to the party, but at most to the sheriff, his interest is deemed too remote to exclude him. Whether the sheriff himself would have been incompetent, it is unnecessary to decide.

It is farther insisted in behalf of the defendants, that the rule of damages adopted by the court was incorrect. A portion of the property attached having been withdrawn from the custody of the receiptors by the act of the plaintiff in the attachments, or rather by the act of his creditors, it was very properly considered, that the receiptors were not responsible for the delivery of the property so withdrawn. The defendants then offered evidence to show the *actual value* of the residue of the property, which remained with the receiptors, and claimed that such value should be the rule of damages, without any reference to the value of the whole property, as fixed in the receipt.

It was held, in the case of *Parsons v. Strong*, 13 Vt. 235, that the value of the whole property, as stated in the receipt, should bind the officer, as well as the receiptor, so that neither could prove the value by other evidence; and this decision seems to be in con-

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formity to the common understanding of such contracts, as well as to the object for which they are made. It is well understood, that these receipts are usually taken and given as security to the officer and creditors, and that no such valuation is often made, as takes place between purchaser and seller. The valuation is, perhaps, generally made with more reference to the amount of the debt, which is to be secured, than to the real value of the property. Hence the property may be greatly over or greatly under rated in the receipt, all parties understanding at the time, that the object of specifying the value is not an appraisal of the property, but to furnish a security for the debt. The contract being thus made and understood, the rule of damages claimed by the defendants would seem to be one, that, in practice, would be quite as likely to thwart, as to carry into effect, the original intent of the parties. The receptor, in conformity to the character of the liability which the officer has been adjudged to be under, (*Bridges v. Perry*, 14 Vt. 262,) would probably be holden to no more than ordinary care and diligence, in the preservation of the property; and in case of the attachment of numerous articles of property, it seems highly probable, that the receptor, in almost all cases, would be able to show a valid excuse for not delivering some small portion of the articles. To hold, in such case, that the value specified in the receipt should be set aside, and the actual value of the residue substituted as the rule of damages, would be a manifest violation of the original intention of the parties, and would, in numerous instances, render the decision in *Parsons v. Strong* ineffectual and nugatory.

Nor does the rule adopted by the county court in this case seem to be free from objections. Although the property attached might, by the consent of the receptors, have been valued in the receipt at more than it was worth, yet they may well have calculated upon the actual value, as furnishing them with security to that extent for the liability they incurred by the receipt. By the rule adopted, of deducting only the actual value of the property withdrawn from their possession from the valuation in the receipt, it is manifest that their real security for their remaining liability might be greatly impaired,—the extent of the injury to them depending upon the proportion of the whole property, which was thus withdrawn. If we apply the rule of damages, adopted in this case, to a case of the

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under valuation of the property in the receipt, it might operate very unjustly to the officer. By way of illustration, let it be supposed, that an attachment is made of the stock on a farm and of hay and grain in the barn, and a receipt taken specifying the whole value to be \$500, which we may suppose is the amount of the debt sought to be secured. If the barn and its contents be destroyed by fire, it is manifest that the receiptors might discharge themselves from their whole liability, by showing that this property, thus destroyed by the act of God, was of the value of \$500, while the stock on the farm, still remaining in the hands of the receiptors, might be of equal value with the sum specified in the receipt, and abundantly sufficient to secure the debt, for which it was attached. On the whole, as the rule adopted by the county court would be likely to operate unjustly in many if not in most cases, we think it an unsafe one to be generally applied.

In order to carry into effect the original intent of the parties, as far as practicable, we think the value of the property specified in the receipt, and not the actual value, should form the basis of the rule of damages, in cases circumstanced like this, as well as where the receiptor is liable for the whole property. The jury should have been instructed, that, assuming the value of the whole property receipted to be the sum specified in the receipt, they should ascertain the just proportion, at that assumed value, which the property retained by the receiptors would bear to the property for which they were not liable, and that their verdict should be for such assumed value of the property remaining with the receiptors. In other words, the rule of damages should be, not the actual value of the property for which they remain liable, but the value which the parties had put upon it by their receipt,—such latter value being ascertained on the assumption that the increased or diminished value of the property specified in the receipt had been rateably apportioned by the parties upon the several articles receipted. This rule, which seeks to charge the receiptors with the portion of the property, for which they remain liable, at the value fixed upon it by their receipt, seems to us the most just that can be adopted.

This rule of damages has not been considered with reference to any other class of contracts than officers' receipts, which are deemed to stand on a peculiar footing of their own.

The judgment of the court below is set aside and a new trial granted.

Hodges v. Adams.

EDWARD F. HODGES v. CHARLES ADAMS.

If a promissory note be made payable to A. B. or order, and A. B. indorse the note in these words, "Pay the contents of the within note to C. D.," the legal effect will be the same, as though the note were indorsed to C. D. or order, and the indorsee of C. D. may maintain an action against A. B., as indorser.

The declaration in favor of a subsequent indorsee of a promissory note against the first indorser will be sufficient on demurrer, although it do not allege, that, by the terms of the defendant's indorsement, the note was ordered to be paid to his immediate indorsee, or his order.

ASSUMPSIT. The plaintiff alleged, in his declaration, that on the twenty seventh day of December, 1841, Benjamin Bishop executed a promissory note for two hundred and fifty dollars, made payable to the defendant, or order; that the defendant, on the same day, by his indorsement in writing, for value received, ordered the contents of the note to be paid to William P. Briggs, waiving demand and notice; that Briggs indorsed the note to the plaintiff; that the note was not paid at maturity; that the defendant thereupon became liable to pay the same to the plaintiff and in consideration thereof promised the plaintiff to pay the same to him upon request; and that the defendant had neglected to make payment, although thereto requested. To this declaration the defendant demurred.

The county court adjudged the declaration sufficient; to which decision the defendant excepted.

C. Adams, pro se.

There is a clear distinction between the negotiability of paper and the liability of parties upon it. The negotiability of a note may be continued, while the liability of the indorser is limited, or withheld. The note is a promise to pay, and may contain an authority to negotiate the promise; so an indorsement may contain a contract of guaranty, and this contract may be assignable; but in both cases the assignable nature of the contract must depend on the contract of the party making it. A note to A. B. is a promise of payment; but this undertaking is not assignable;—but a note to A. B. or order is an undertaking to pay A. B. or his assigns; and, on indorsement by A. B., every subsequent holder becomes his assignee. Hence in

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this case the plaintiff might have sued Bishop, on the ground that it was consistent with the contract of Bishop. *Moore v. Manning*, Com. R. 311. *Acheson v. Fountain*, Str. 557. *Edie v. E. India Co.*, 2 Burr. 1216. The liability of the indorser is created by the contract of indorsement, and the extent of the liability must depend upon the language used. An indorsement is twofold,—a transfer of the interest of the indorser and an undertaking relative to the punctuality and ability of the maker; and hence even the same words must be construed differently, as they relate to one or the other. On a note, payable to A., or order, an indorsement "pay to B." will transfer the note to B., so that he, or those to whom he delivers it, may collect of the maker; but the guaranty of the indorser can only be enforced by the party with whom it is made, unless there are terms of negotiability in the indorsement. The case at bar is resolved into a mere bill of exchange, drawn by the defendant on Bishop in favor of Briggs.

Briggs and Underwood for plaintiff.

The principle, that an indorser cannot restrain the negotiability of a promissory note, negotiable upon its face, when he passes his whole interest to his indorsee, is, we apprehend, too well settled to be questioned. 2 Burr. 1218. 1 W. Bl. 295. Kyd on Bills 61, 64. Str. 567. *Stone v. Rawlinson*, Willes 559. *Vincent et al. v. Horlock*, 1 Camp. 442. Chit. on Bills 230. 6 Bac. Abr. 676. There are cases of restrictive indorsement; but these are exceptions to the rule; and unless the indorsement express such restriction in positive terms, the instrument passes to the indorsee with as full power farther to indorse it as his indorser had. *Edie v. E. India Co.*, 2 Burr. 1216. *Moore v. Manning*, Com. R. 311. 1 Selw. 344. *Acheson v. Fountain*, 1 Str. 557. *Cunliffe v. Whitehead*, 3 Bing. N. C. 828; 5 Scott 31. *Sigourney v. Lloyd*, 8 B. & C. 622; 2 M. & R. 58. 5 Bing. 525. *Treuttel v. Barandon*, 8 Taunt. 100. *Snee v. Prescott*, 1 Atk. 249. 1 Bl. R. 295. *Rice v. Stearns*, 3 Mass. 225. *Wilson v. Holmes*, 5 Mass. 543. *Russel v. Ball*, 2 Johns. 50. *Potts v. Reed*, 6 Esp. R. 57. *Haussoullier v. Hartsinck*, 7 T. R. 733. Had the declaration set forth the indorsement as payable to Wm. P. Briggs, or order, the note and indorsement, without the words "or order," would have been admissible in support of the declaration,

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because that is the legal effect of it. *Smith v. McClure*, 5 East 476. *Frederick v. Cotton*, 2 Show. 8. *Fisher v. Pomfret*, 12 Mod. 125; *Carth.* 403. 2 Stark, Ev. 153.

The opinion of the court was delivered by

BENNETT, J. This case comes before the court upon demurrer to the declaration. It is not alleged, that the defendant, as indorser of the note, ordered its contents to be paid to Wm. P. Briggs or *his order*; and hence it is claimed in argument, that the indorsement is a restrictive one, not empowering Briggs to negotiate the note to the present plaintiff.

If the indorsement, as set up in the declaration, is to be *restricted* to Briggs, it is quite clear the plaintiff could not maintain any action against the maker of the note; and perhaps he would not stand upon any better ground, as against this defendant, as indorser. But we think the indorsement to Briggs cannot be treated as *restrictive*. The case of *Moore v. Manning*, Com. Rep. 311, was decided upon demurrer, and was in all points identical with the present, except in that case the action was against the maker of the note. In the case of *Acheson v. Fountain*, 1 Str. 557, the bill was payable to Abercrombie, or order, and indorsed thus, "Pay the contents to Louisa Acheson;" but the declaration alleged the indorsement to have been made to Acheson, or order; and it was adjudged, that there was no variance. The court said, it was declared on according to the legal effect of the indorsement, and that Acheson was authorised by it to make an indorsement over. To the same effect is the case of *Edie et al. v. East India Company*, 2 Burr. 1216.

The law interprets the indorsement to be in the same manner, as the note, or bill, shall have been drawn, unless restrictive words are used. If Briggs had, by virtue of the indorsement to him, the right to negotiate the note to the plaintiff, it is difficult to see why the defendant is not liable, as indorser, to the plaintiff.

It is said in argument by the defendant, that, though it may be true, that the plaintiff may maintain an action on this indorsement against the maker of the note, yet the liability of himself, as indorser, can only be enforced by Briggs, inasmuch as there are no terms of negotiability in the indorsement. The fallacy in this argument is, that the words of the indorsement are interpreted by the negotiable

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character of the note, and the note, as against the maker, being negotiable, the contract between the defendant as indorser and Briggs as indorsee is equally negotiable, though it was not indorsed to him *or order*. The legal effect is the same, as if it had been so indorsed.

The judgment of the county court is affirmed,



GEORGE MORTON AND PHILO CLARK v. JOHN EDWIN.

The certificate of a justice of the peace, of the time when an execution and return of levy upon real estate was recorded in his office, is but *prima facie* evidence; and parol evidence is admissible to show the true time when such record was made.

The justice of the peace, who made such record and certificate, may be called as a witness, to prove when the record was in fact made.

The levy of an execution upon real estate is a proceeding *in rem*; the requirements of the statute are in the nature of a condition precedent, and must have been strictly complied with, in order to pass the title.

Quere, Whether it is essential to the passing of the title, that the execution and return must have been recorded at length in the office of the town clerk and of the clerk, or justice of the peace, from whence it issued, within the life of the execution?

But at all events the creditor cannot sustain an action of ejectment against the debtor, founded upon the levy, unless the execution and return have been recorded at length, in both offices, prior to the commencement of the action.

In this case, after judgment had been pronounced, affirming the judgment of the court below, which was in favor of the defendant, the judgment of affirmance, on motion, was not entered up, but the court, *pro forma*, reversed the judgment of the county court and suffered the plaintiff to become nonsuit.

EJECTMENT for land in Williston. Plea, the general issue, and trial by the court, March Term, 1845,—BENNETT, J., presiding.

The plaintiffs claimed title to the premises by virtue of the levy of an execution in their favor against the defendant, and gave in

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evidence, among other things, a certified copy of the record of the execution and return of the levy from the office of the justice of the peace who issued the execution. The execution was dated October 10, 1842, and was made returnable in one hundred and twenty days. The officer's return of the levy was in due form, and was dated February 7, 1843; and there was appended to it a certificate, signed by the justice, in these words,—“Received and recorded, February 7, 1843, at six o'clock in the afternoon.” To this the defendant objected, and he offered to prove, by the justice who issued the execution, that the record was not in fact made by him until after the expiration of the life of the execution. The plaintiffs objected to this evidence, but the objection was overruled and the justice was introduced as a witness, and testified that the execution was returned to him within its life, and he then minuted upon it the true time when it was received for record, but that he did not in fact record it in his office until after the commencement of this suit. Upon this evidence the court held that the title to the premises did not pass by the levy and rendered judgment for the defendant. Exceptions by plaintiffs.

C. D. Kasson for plaintiffs.

1. The important question in this case arises upon the construction of section seventeen of chap. 42 of the Revised Statutes. By comparing that section with sections four and six of chap. 60, it will be noticed, that the language relative to the recording of *deeds* is far more imperative than that relating to the recording of executions. Yet it has been uniformly held, that, as between parties and purchasers with notice, a deed is good without recording. The object of the statute is notice to others. The record in the town clerk's office is sufficient for this, or, if not, the files of the justice are as open to inspection as his records. The actual time of transcribing a deed on the book has always been held to have relation to the time it was *received* into the office for record, and so, when a record is required and is made, the instrument becomes operative from its date, or execution, by retrospect, or relation. *Douglass v. Spooner*, N. Chip. 74. Our statute upon this subject seems to be a copy, in most of its phraseology, of the Massachusetts statute; and it has been often held there, that the actual transcribing of the return of

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the levy was unnecessary. *Ladd v. Blunt*, 4 Mass. 403. *McLellan v. Whitney*, 15 Mass. 137. *Prescott v. Pettee*, 3 Pick. 331. 1 Sw. Dig. 795. 6 T. R. 20. The uniform construction practically given to the statute in this State is entitled to great weight, as furnishing evidence of the plain intention of the legislature.

2. We claim, that, as the duly certified copy of the execution and return, offered in evidence, showed them to be recorded, it could not be contradicted by parol. The certificate that the execution is recorded, and of the time when it was received, is part of the record itself. *Barnard v. Flanders*, 12 Vt. 658. *Durfee v. Hoag*, 1 Aik. 286. *Spalding v. Chamberlain*, 12 Vt. 538. *Pike v. Hill*, 15 Vt. 183.

D. A. Smalley for defendant.

1. The levy, under which the plaintiff claims title, is invalid,—the record not having been made in the justice's office within the life of the execution. *Downer v. Hazen*, 10 Vt. 418. *Hubbard v. Dewey*, 2 Aik. 312. *Hall v. Hall*, 5 Vt. 304. BENNETT, J., in *Fletcher v. Bradley*, 12 Vt. 22.

2. The statute requires, that the execution be recorded,—not merely *received for record*. And such a levy being solely authorized by statute, the directions of the statute must be literally followed, in order to make it valid. The minute made by the justice is not even a part of the process of recording. It constitutes no notice to any one. *Burton v. Pond*, 5 Day 162.

3. The evidence of the justice was properly admitted, to show when the record produced was actually made. *Carpenter v. Sawyer et al.*, 17 Vt. 122. *Isaacs v. Chandler et al.*, cited in *Ib.* *Burton v. Pond*, 5 Day 162.

4. Even if the court should be of opinion, that the levy might be recorded after the life of the execution had expired, and that it would then be effectual to pass the title, it would not help the present case, since it appears that the record was not made until after the commencement of this suit.

The opinion of the court was delivered by

BENNETT, J. The first question relates to the admissibility of the *parol* evidence, which was offered to show the true time, at which

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the execution was recorded in the office of the justice, from whom it issued. In the case of *Olmstead v. Hoyt*, 4 Day 436, it was held, that parol evidence was admissible, to show the actual time of praying out a writ, though it contravened its date; and the same decision was had in *Parkman v. Crosby*, 16 Pick. 297; and in Connecticut it seems well established, that the return of an officer, whether on *mesne* or final process, is only *prima facie* evidence, and may be disproved by parol; *Dutton et al. v. Tracy*, 4 Conn. 79; *Watson et al. v. Watson*, 6 Conn. 334. In the case of *Burton v. Pond*, 5 Day 162, which was an action of ejectment to recover land set off on execution, the town clerk had endorsed on the execution, these words, "Received for record the 15th day of June, 1809, and recorded by _____ Clerk." Yet it was held, that the true time, when the execution was recorded, might be shown by *parol*. The case of *Isaacs v. Chandler et al.*, decided in our own court, Lamoille County (1842) is a full authority for the decision of the court below. See *Carpenter v. Sawyer et al.*, 17 Vt. 122.

In *Hubbard v. Dewey*, 2 Aik. 312, it was expressly held, that the respective certificates of the town clerk and magistrate, or clerk of the court, that they have recorded the execution, are but *prima facie* evidence and may be rebutted.

The evidence in this case shows, that the execution was not recorded in the justice's office, until after this suit was commenced. The important inquiry is, shall this defeat the present action? The statute provides, that "All executions, extended and levied upon real estate, with the return of the officer thereon, being recorded in the office wherein deeds of such real estate are required by law to be recorded, and also returned into the office of the clerk of the court, or justice, from whom such execution issued, and there recorded, shall, as against the debtor in such execution, his heirs and assigns, make a good title to the creditor, his heirs and assigns forever." Rev. St. 240, § 17.

It has always been held, that, to pass the title to real estate under a levy of execution, the statute must have been strictly complied with. It is a proceeding *in invitum*, as was said in *Mitchell v. Kirtland*, 7 Conn. 229, and in derogation of the common law. Hence all the statute requisites to the passing of the title must have been complied with. They are in the nature of conditions precedent. The record-

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ing of the execution in each of the offices is as much a prerequisite to the passing of the title, as the levy itself.

The question raised in this case can hardly be considered an open one in this state. In *Hubbard v. Dewey*, 2 Aik. 312, it was expressly held, that the title does not pass, until the execution has been recorded at length in both offices; and this has been the doctrine of our courts as often as the question has come before them. See *Hall v. Hall*, 5 Vt. 304. *Downer v. Hazen*, 10 Vt. 418. The same doctrine has been established in Connecticut, under their statute, which is similar to ours. *Burton v. Pond*, 5 Day 162. *Coe v. Stow*, 8 Conn. 536.

It is said in argument, that the recording the execution in the justice's office should, by fiction of law, have relation back to the time it was received and filed for record. But a legal fiction is always consistent with equity, and will never be permitted to work a wrong, contrary to the real truth and substance of the thing. The plaintiffs had no title, when they commenced the suit; and there was no eviction, or adverse holding, by the defendant. It would be strange indeed, if all this could be supplied by legal fiction. The defendant is neither party or privy to the proceeding; and a fiction of law will not be adopted to the injury of such person. 5 Day 162. 8 Conn. 536. In the case of a deed, the title passes by the deed, and the only object of the recording is *notice*. In such case, the recording may well have relation back to the time the deed was received and filed by the town clerk for record.

It has been argued, that it is essential to the passing of the title, that the execution should have been recorded in the two respective offices in its life. In the case of *Hubbard v. Dewey*, 2 Aik. 312, it is said, it was held to be the duty of the officer to procure the execution to be recorded, not only in the town clerk's office, but also in the office from which it issued; and in *Hall v. Hall*, 5 Vt. 304, it is said, the court advance the doctrine, that it is absolutely necessary, that some period should be definitely fixed, in which the doings of the officer should be completed and the rights of the parties fixed. That all this should be done being necessary to the passing of the title, it is claimed that it must be done within the life of the execution; and if not, we are asked, when shall it be done? And after what lapse of time shall it be too late to complete the records, so as to divest the debtor of his title?

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It is also said in argument, that the debtor's equity of redemption only runs from the time the legal title passes from him, and that the creditor would not be entitled to possession until six months from the time the debtor is divested of his title; and if the officer might, at any convenient time after the execution had run out, cause it to be recorded in either of the offices, "no certain period" it is said, "could be definitely fixed, in which the doings of the officer should be completed and the rights of the parties fixed."

Though there appears to be much weight in the argument, yet we do not find it necessary to pass upon the question, notwithstanding the counsel have argued it at length.

To sustain ejectment, the plaintiff must have title, both at the commencement of the suit, and at the time of trial. We all agree, that the recording the execution at length in both offices was essential, and a prerequisite to the passing of the title under the levy. As this was not done, when this suit was commenced, the judgment of the county court must be affirmed.

HALL, J., dissenting. The question in this case is, whether a levy on lands, where the execution was returned into the office of the justice and filed there for record within the life of it, but not actually recorded until after the bringing of the action, is valid, to lay a foundation for a recovery in the suit?

It was held, in the cases of *Hall v. Hall*, 5 Vt. 304, and *Downer v. Hazen*, 10 Vt. 418, that, where the officer neglected to make return of the execution within its life, the levy could not afterwards be completed, but was inoperative and void. And although intimations have been thrown out, that a *record* in both the town clerk's and justice's office, *within the life of the execution*, was necessary, to pass the title, yet the question as to the effect of the mere omission to record in the latter office, when the execution had been duly returned there, has never before, that I am aware of, been presented to the court. I therefore consider it an open question.

The statute declares [Rev. St. c. 4, § 17] "that all executions, extended and levied upon real estate, with the return of the officer thereon, being recorded in the office wherein deeds of real estate are by law required to be recorded, and also returned into the office of the clerk of the court, or justice of the peace, from which such execution issued, and *there recorded*, shall, as against such debtor"

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&c., make a good title to the creditor. There is no time specified by the statute, within which these things shall be done; but as the officer is commanded in the precept itself to make the return of it, with his doings thereon, into the office of the clerk, or justice, within sixty days, and this being his general and known duty, it has been properly held by this court, that the return should be made by the officer within the life of the execution. But I find nothing in the statute, extending the duty of the officer beyond the time of making this return into the office of the clerk, or justice, from which the execution issued. The statute does not prescribe it, as part of his duty, to see that the execution is recorded by the justice. On the contrary, the statute form of the return, which he is required to make on the execution, declares, that "he returns the execution into the office of the clerk of the court, or justice of the peace, from which it issued, *together with the sum of seventy five cents, that it may be there recorded;*"—most clearly implying, that, on returning the execution and paying the fees, his duty had ceased, and that the act of recording it in the justice's office was matter for the justice alone, with which the officer had nothing to do. Finding nothing in the statute requiring the justice to perform this duty in any specified time, I am not prepared to say, that it must be done within the life of the execution. Indeed, as I think the officer has to the last moment of the execution in which to return it, I must hold that such requirement of the justice would be impracticable.

Nor can I discover any reasons of public policy, which require that this record should be made by the justice, while the execution is in life. The object of the legislature in requiring this record is not very apparent; at least, it is difficult to discover any very important purpose to be answered by it. It could not have been required for the purpose of giving notice to creditors and subsequent purchasers, because that object is fully accomplished by the previous record in the town clerk's office. And it is not very easy to perceive, why the original execution and return, which form a part of the official papers of the justice, and which it is his duty to keep on file and preserve, would not answer any purpose of the debtor and creditor, equally as well as a record of it.

The former statute of Connecticut, like ours, required the execution and return to be recorded in the office of the clerk, or jus-

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tice, from which it issued; but that requirement has long since been dispensed with, and the execution is now to be merely returned and kept on file. 1 Swift's Dig. 154-5. The statute of Massachusetts requires that the execution, after the levy and record in the office of the register of deeds, should be "returned into the clerk's office," but without any record there; and it has been held in that state, that, although the title of the creditor is not complete until such return of the execution, yet, that the return may be made at any time, before the levy is offered in evidence of the title of the creditor, the statute not specifying any time for such return being made. *Prescott v. Pettee*, 3 Pick. 331.

I suppose the whole object of our statute, in directing the record to be made in the justice's office, was to furnish additional security for the preservation of the evidence of the levy, because I can conceive of no other. The recording is, indeed, a statute requirement and cannot be disregarded. But surely, before determining that such record shall be made within a shorter period than the words of the statute require, and at the peril of rendering the levy void, we ought to find some good object to be answered by such determination. I am induced to think, if the officer make his return of the execution into the office of the justice while it is in life, the levy will not be void, because the justice happens to make the record of it after the sixty days have expired. I come to this conclusion not the less readily, from an apprehension which I strongly entertain, that a contrary determination would unsettle very many titles in the state, which have hitherto been deemed valid.

It is said, however, that, the justice's record in this case not having been made at the time of the commencement of the present suit, the plaintiff's title was then, at all events, incomplete, and that he should not be allowed to recover, whatever may have been the effect of the subsequent recording upon his title. I confess, I should be willing to sustain this action, notwithstanding this objection. I see no insuperable difficulty in treating the time of the recording by the justice as matter affecting the evidence merely, as was done in Massachusetts in *Prescott v. Pettee*, in regard to the return of the execution into the clerk's office, and in holding, that the evidence should be sufficient, if it was complete at the time of offering it. I think, also, that we might properly treat the actual trans-

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cribing of the execution upon the justice's record as having relation back to the time of the filing of it, and consider the record as having been made when the execution was received for record by the justice, as is done in the recording of deeds. Considering the very trifling importance of this record by the justice, I should have been well satisfied to sustain the present action upon either of those grounds.

But the mere question of whether the action is prematurely brought, or not, is one of no practical importance; and considering that the case of *Burton v. Pond*, 5 Day 160, upon a statute similar to ours, is directly to the point, that an action brought before the actual making of the record is premature, I am induced to assent to the affirmance of the judgment in this case on that ground.

It does not occur to me, that any practical difficulties are likely to arise in regard to the redemption of the land by the debtor, from holding that the execution need not be recorded within the life of it. The statute provides, that the debtor may redeem within six months "*from the time the execution was extended on the land*"; which, as intimated by the court in the case of *Hall v. Hall*, may be well treated as the time when the acts of the officer, in making the levy, become complete by *filing* the execution in the office from which it issued. If it be said the levy may never be perfected by the recording of the execution, I think it a sufficient answer, that the debtor will have his election to risk the consequences of a neglect to redeem, or to pay the amount of the levy; and that the worst event which can possibly befall him, by redeeming a defective levy, will be the payment of a just debt.

After the judgment had been pronounced, the judgment of affirmance, upon motion, was not entered up; but the court, *pro forma*, reversed the judgment of the county court, and the plaintiff became nonsuit.

NOTE by HALL, J. In the case of *Dixon v. Parmelee*, 2 Vt. 187, it would appear to have been held by the supreme court, that a record of the execution and levy in the office of the clerk of the court, made after the action was brought, perfected the title of the creditor, and was sufficient to enable him to sustain the action. The attention of the court was not called to this case, and it was not noticed until after the decision.

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WILLIAM P. BRIGGS v. GEORGE S. HUBBARD.

The court will not construe a statute as intended to have a retrospective operation, unless such intention is clearly manifested by the terms of the statute.

By the Revised Statutes it was provided, that in certain cases a judgment rendered by a justice of the peace might be vacated, on petition to the county court at the first or second stated term after the rendition of the judgment, and the case be proceeded with as though entered by appeal. By the statute of Nov. 1, 1843, the limitation was repealed, and it was provided, that no such petition should be sustained, "unless brought within two years next after the justice's judgment." And it was held, that it was not the intention of the legislature, that the statute of 1843 should be retrospective in its operation, so as to allow a petition to be sustained in a case in which, before the enactment of the statute, the limitation provided in the Revised Statutes had expired.

THIS was a petition, founded on section eight, chapter thirty three, of the Revised Statutes, praying that a judgment rendered against the petitioner by a justice of the peace, by default, might be reversed, and a trial be allowed in the case. The petition was preferred on the first day of January, 1844; and the petitioner alleged, that the judgment by default was rendered on the second day of May, 1842. The defendant moved, that the petition be dismissed, for the reason that it was not preferred at the first or second stated term of the county court next after the rendition of the judgment by default.* The county court, March Term, 1844,—BENNETT, J., presiding,—dismissed the petition, *pro forma*. Exceptions by petitioner.

Briggs and Underwood for petitioner.

The statute of Nov. 1, 1843, is made for the suppression of fraud and to give a speedy remedy for a right, and should be liberally

*By sect. 9, chap. 33, of the Revised Statutes it is provided, that no such petition shall be sustained, unless preferred at the first or second stated term of the county court after the rendition of such justice's judgment. By section one of the statute of Nov. 1, 1842, [Acts of 1843, p. 7.] it is provided, that no such petition shall be sustained, "unless brought within two years next after the justice's judgment." And by section two of the same statute the limitation in sect. 9, chap. 33, of the Revised Statutes is repealed.

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construed, because such a construction is in furtherance of justice. 3 Inst. 381 b. *Dayton v. Grimke*, 2 Bail. Eq. R. 392. *Blake v. Haywood*, Ib. 208. *Wimbish v. Talbois*, Plowd. 48. 9 Bac. Abr. 252. *Pool v. Nutt*, 2 Sid. 63. 1 Kent 484. In construing a remedial statute the enacting words may be extended beyond their natural import and effect, in order to include cases within the same mischief. *St. Peters v. Middleborough*, 2 Yo. & Jer. 196. *Crocker v. Crane*, 21 Wend. 211. 3 Cow. 89. 15 Johns. 380. This statute should be construed as a part of sections eight and nine of chap. 33 of the Revised Statutes. Minot's Dig. 653. *McCartee v. Orphan Asylum*, 9 Cow. 437.

It is contended, that the law is unconstitutional, because it disturbs vested rights;—but it is difficult to see how a vested right can be acquired by *fraud* and *circumvention*,—and still more difficult to see how that right is disturbed by giving the parties a fair hearing in a court of justice. *Foster v. Essex Bank*, 16 Mass. 245. *Commonwealth v. Hampden*, 6 Pick. 501. *Knight v. Dorr*, 19 Pick. 48. Statutes affecting the remedy, merely, are not within the prohibitory clause of the constitution. *Sturges v. Crowninshield*, 4 Wheat. 122. 16 Mass. 245. *Maidstone v. Stevens*, 7 Vt. 487. *Locke v. Dane*, 9 Mass. 360. *Holden v. James*, 11 Mass. 306. 3 Story's Com. on Const. 248. *Williams v. Norris*, 12 Wheat. 128. *Mason v. Haile*, Ib. 370. *Catlin v. Jackson*, 8 Johns. 520. *Brown v. Storm*, 4 Vt. 37. *Bell v. Roberts*, 15 Vt. 741. *Bemis v. Clark*, 11 Pick. 452. *Holyoke v. Haskins*, 9 Pick. 259. *Bacon v. Calender*, 6 Mass. 303. 3 Metc. 213.

J. Maeck for defendant.

Statutes should be prospective, only, in their operation. 4 Bac. Abr. Statute C. 2 Co. Inst. 292. 1 Bl. Com. 46. Retrospective statutes, when they interfere with private, vested rights, are unjust, oppressive, unconstitutional and void. 1 Kent 455-6. *Dash v. Van Kleek*, 7 Johns. 503, 505, 507. 2 Gal. 134, 141. *Gilmour v. Shuter*, 2 Mod. 310. *Couch q. t. v. Jeffries*. 4 Burr. 2460. 1 Bay 93, 179. *Calder et ux. v. Bull*, 1 Pet. U. S. Cond. R. 172. *Ogden v. Blackledge*, Ib. 411. *United States v. Schooner Peggy*, Ib. 258. *Foster v. Essex Bank*, 16 Mass. 270. *Brown v. Penobscot Bank*, 8 Mass. 449. *Medford v. Learned*, 16 Mass. 215. *Somerset v.*

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Dighton, 12 Mass. 395. *Woart v. Winnick*, 3 N. H. 487. *Lowry v. Keyes*, 14 Vt. 66. No legislature has the power of passing a statute of limitations, suddenly barring actions on past transactions, —as for torts; and if so, they have not the right of opening a transaction, by removing the statute. The rights of the parties in the latter case are to be adjudged by the laws in existence when the statute was passed. A party can equally have a vested right to a defence, as in any other thing. MARSHALL, Ch. J., in *Sturges v. Crowninshield*, 4 Pet. Cond. R. 421. *Call v. Hagger*, 8 Mass. 430. It has been endeavored to maintain the existence of such powers, on the ground that statutes of limitation relate to the remedy only. But where the statute either destroys or impairs the right, the argument is mere nonsense. STORY, J., in *Le Roy v. Crowninshield*, 2 Mason 168. So reluctant have courts been to suppose the legislature intended to give a retrospective effect to a statute, that they have held they would not infer such intent, unless the legislature had manifested it by the most express and positive terms. *Gilmour v. Shuter*, 2 Mod. 310. *Couch q. t. v. Jeffries*, 4 Burr. 2460. *Dash v. Van Kleek*, 7 Johns. 477. *Woart v. Winnick*, 3 N. H. 472. *Society v. Wheeler*, 2 Gal. 105. *Medford v. Learned*, 16 Mass. 215. *Whitman v. Hapgood*, 10 Mass. 437. *Somerset v. Dighton*, 12 Ib. 395. *Call v. Hagger*, 8 Ib. 429. *Williams v. Pritchard*, 4 T. R. 2. 1 Pet. Cond. R. 257.

We likewise contend, that the statute, if retrospective, is contrary to the constitution of the United States, because it impairs the obligation of a contract. A judgment is a contract of the highest nature, and has so been repeatedly held by this court. Here this contract had become perfect, as against this remedy; and we contend that a statute, which exposes it again to this remedy, impairs its obligation.

The opinion of the court was delivered by

BENNETT, J. The judgment, sought in this case to be vacated, was rendered on the second day of May, 1842; and the present petition was not prayed out, until more than two terms of the county court had elapsed from the time of the rendition of the judgment. This petition is brought under the eighth section of chap. 33 of the Revised Statutes; and the ninth section provided, that no such petition should be sustained, unless preferred at the first or second

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stated term of the county court next after the rendition of the judgment by the justice. This section continued in force until after the petitioner was fully barred of his present remedy. The statute of 1843 declares, that no petition shall be sustained under the provisions of sections 8 and 9 of chap. 33 of the Revised Statutes, unless brought within two years next after the rendition of the judgment by the justice. The second section of the statute of 1843 repeals so much of the ninth section of the Revised Statutes, as related to the time in which the petition must have been preferred.

We are now called upon to revise the decision of the county court, dismissing the petition.

The case has been argued, somewhat at length, upon the ground, that the statute of 1843 is unconstitutional, if intended to apply to a case, in which the petitioner had no right to prefer his petition at the time the law was passed.

Some members of the court consider, that the judgment of the justice is a contract, within the tenth section of the first article of the constitution of the United States,—which restrains the state legislatures from passing any law impairing the obligation of contracts,—and that the judgment, being unappealed from, and the time having elapsed, in which a petition could be preferred under the then existing laws, became to all intents and purposes a *final judgment*, and that any law subsequently passed, authorizing the court, in its terms, to vacate the judgment, must, of necessity, impair its obligation.

The statute, in such case, if constitutional to would empower the county court to set aside and vacate a judgment, which had become *final and absolute* before any attempt on the part of the legislature to confer the power, and which must otherwise have remained a *final and absolute judgment*. So far as this question is concerned, I do not perceive that it can make any difference, whether the legislature directly vacate the judgment and grant a new trial, or empower the court to do it. If the legislature directly granted the new trial, it might be farther objected, that the granting the new trial was a judicial act; but the obligation created by the judgment would be none the less impaired in the one case, than in the other.

The statute of 1827, appointing road commissioners, made it their duty to make personal inspection of the subject matter of the

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petition which should be preferred to them, and to adjudicate and make order thereon, which was made *final* and *conclusive*; and the statute authorizes the commissioners to tax cost in behalf of the successful party and issue execution for the same. In 1828 the statute was passed, giving an appeal from the determination of the commissioners to the county court; and one section of the statute allowed an appeal from the decision of the commissioners already made, if applied for within ninety days after the passing of the statute. In the case of *Hill et al. v. Sunderland*, 3 Vt. 507, it was held, that this section of the statute was unconstitutional and void, as it respected those persons, to whom damages and costs had been awarded when the act was passed. It was considered, that such persons had acquired a right to the damages and costs, which had been awarded them under the adjudication of a tribunal of competent jurisdiction, which was, when made, *final* and *conclusive*, and that those rights could not be hazarded, or destroyed, by subsequent legislation.

It appears to me, that that case goes far to determine the character of the statute in question, as applied to the case before us. But we do not find it necessary to put the case upon this ground, since the court are all well agreed, that it could not have been the intention of the legislature, that the statute of 1843 should have a *retroactive* operation, so as to embrace those cases, in which the remedy was fully barred when the statute was enacted.

It is an elementary principle, that all laws are to commence *in futuro* and operate *prospectively*; and no one can question the correctness of the position, as a general rule, that no statute is to be so construed, as to have a retrospective operation beyond the time of its enactment, unless the language is too explicit to admit of any other construction. The statute of 29 Charles II, called the statute of frauds, enacted, that no action should be brought, after a certain day specified, upon any agreement in consideration of marriage, &c., unless some note or memorandum in writing be signed &c. It was held, that this statute should not be so construed as to affect parol promises, made before its passage. The court considered, that the intention of the Parliament was only to prevent for the future, and that it was a *cautionary* law. *Helmore v. Shuter et al.*, 2 Show. 17. See also the case of *Dash v. Van Kleek*, 7 Johns. 493,—where the question of construction was much considered by THOMPSON, J.

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The statute of Charles II is very strong. Its language is, *no action shall be brought, &c.* The statute of 1843 declares, that no petition shall be sustained, unless brought within two years after the rendition of the judgment by the justice. This is not, in terms, declaring, that every petition shall be sustained, if brought within the two years; and we are not bound so to construe these words, unless we think such was the intention of the legislature. So to construe them would be to open afresh a controversy, which had become closed by lapse of time, and in which the rights of the parties had become so fixed, as not to be liable to be disturbed under the then existing laws. Every law, that takes away or impairs *rights vested* agreeably to existing laws, is retrospective. To say the least of such laws, they are generally unjust, and neither accord with sound legislation, nor the fundamental principles of the social compact. It would be an unjust imputation against the legislature, to suppose they intended a law of that description, unless the most clear and unequivocal language is used.

The law under consideration does not necessarily, or even reasonably, require such an interpretation, as to affect the case now before the court. As the statute of 1843 repeals the limitation under the former statute, it was doubtless the intention of the legislature, that it should be so far retrospective, as to reach cases, upon which the statute bar had not then fully run. Farther than this we think the legislature did not intend to go. Farther than this the language of the statute does not require us to go.

The result is, the judgment of the county court, dismissing the petition, is affirmed.



TOWN OF BURLINGTON v. TOWN OF ESSEX.

An order of removal of a pauper and his wife and "their four children" will not be quashed on motion, although it do not state the names of the children, nor allege that the children are minors. The court will rather intend that a pauper's children, living with him as a part of his family, were dependent upon him as a parent and subject to his parental control, than that they were adult children and emancipated.

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At common law the settlement of an illegitimate child was at the place of his birth, unless fraud had been practised to occasion the birth to happen at that place, or the mother had been transported or conducted thither under legal authority ;—and in this respect the rule of the common law, in this state, was not changed by the statute of 1801.

And under the statute of 1817 the settlement of an illegitimate child, acquired by birth previous to the enactment of that statute, will not be changed by the mother's acquiring a new settlement by marriage, but only by the mother's acquiring a new settlement in her own right.

APPEAL from an order of removal of certain paupers from Burlington to Essex, made by two justices of the peace. It was stated in the order, that the justices considered, that "Henry H. Messenger with his wife Susannah H. Messenger and his four children" had become chargeable to Burlington as paupers, and that his legal settlement was in Essex, and that "of right he ought to be removed, with his said wife and family," to Essex; and it was ordered, "that the said Henry H. Messenger do remove, with his said wife Susanna H. Messenger and their four children and effects," to Essex by a time specified, or that they be removed, according to the statute. The defendants moved to quash the order, as to the four children, because they were not named, either in the order, or warrant, and because it was not alleged that they were minor children; and it was averred, in the motion, that four children were in fact removed, by virtue of the order.

The county court, May Term, 1844,—ALLEN, assistant judge of Chittenden county court, presiding,—overruled this motion; to which decision the defendants excepted.

The parties then agreed upon the following statement of facts. The pauper, Henry H. Messenger, was the illegitimate child of one Eward Badger, and was born in Essex, in 1814. In 1827, and before he became of age, his mother was married to a man who then had his legal settlement in Jericho, in this state; and the pauper then removed to Jericho with his mother, and continued to reside with her there, in the family of her husband, until after he became twenty one years of age. The mother of the pauper, at the time of his birth and until her marriage, as above stated, had her legal settlement in Essex; and the pauper did not, at any time after the mar-

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riage, acquire a legal settlement in Essex in his own right, and was, at the time of his removal, chargeable to Burlington.

The county court, October Term, 1844,—ALLEN, assistant judge, presiding,—decided, that the paupers were duly removed. Exceptions by defendants.

J. Carpenter and A. Peck for defendants.

The pauper took the settlement of the mother, in Jericho.

1. It is conceded, that, at common law, a bastard takes a settlement by birth, but none by parentage. The reason, at common law, for giving the child the settlement of the father, is that they ought not to be separated; *Cumner v. Milton*, 2 Salk. 528. This rule was not applied to bastards, for the reason, that, at common law, a bastard is considered *nullius filius*. But as our law recognizes the relation of parent and child between the mother and bastard, the rule here ought to be different. This consideration induced the court in Connecticut to allow a bastard to take the settlement of the mother, by parentage, whether that settlement was in her own right, or derivative,—and regardless of the time when acquired. 1 Sw. Dig. 48. 2 Ib. 821. Reeve's Dom. Rel. 276. 1 Root 29. *Canaan v. Salisbury*, 1 Root 155. *Hebron v. Marlborough*, 2 Conn. 20. *Danbury v. New Haven*, 5 Conn. 584. *Woodstock v. Hooker*, 6 Ib. 36. *Guilford v. Oxford*, 9 Ib. 322. *New Haven v. Newtown*, 12 Ib. 165.

2. If the common law rule is settled in this state, in the absence of legislative provision, it is insisted that the statute of 1817, in force at the time of the marriage of the mother, which provides that "a married woman shall always have the settlement of her husband," "legitimate children shall have the settlement of their parents," "illegitimate children shall have the settlement of their mother," and that "children shall not gain a settlement by birth," is decisive. The statute cannot be limited to the settlement existing at the birth of the child; had such been the intention, it would have been so expressed. To limit it to a settlement of the mother in her own right would be equally absurd;—as in that case the mother might have a settlement derived from her father at the birth of the child, and yet the child be without a settlement. We insist that by the statute, in all cases, when the children take the settlement of the father, whether his is a settlement in his own right, or derivative, they

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follow his settlement; and when they take the settlement of the mother, they follow hers in the same way. Similar statutes in New York and Massachusetts are so construed. *Plymouth v. Freetown*, 1 Pick. 197. *Canajoharie v. Johnstown*, 17 Johns. 41. *Petersham v. Dana*, 12 Mass. 429.

3. The order as to the four children ought to have been quashed. It appears that there were four children, who were removed; this distinguishes the case from *Bristol v. Braintree*, 10 Vt. 203. See *Hartland v. Williamstown*, 1 Aik. 241; *Newbury v. Brunswick*, 2 Vt. 151. *Wells v. Westhaven*, 5 Vt. 322.

Kasson and Buckley for plaintiffs.

1. The English cases, where orders have been quashed as to persons not mentioned *by name*, are where the words of the order were "A. and his family,"—and upon the obvious ground, that the term "family," under the English statute, might include servants and others not removable. But it has never been doubted, that the words "A. and his wife" were sufficiently certain; nor was it ever held, that the words "A. and his wife B. and their children" were insufficient. *Newbury v. Brunswick*, 2 Vt. 158. *Bristol v. Braintree*, 10 Vt. 203.

2. The pauper was born in Essex while the statute of 1801 was in force; and hence, by the rule of the common law, he had his settlement where he was *born*; *Manchester v. Springfield*, 15 Vt. 385;—and in that case it was held, that a bastard did not follow the *derivative* settlement of his mother; and the same principle is adopted in *Wells v. Westhaven*, 5 Vt. 326,—where the court held, that the children of a *widow* by the first husband derived no settlement from the *second* husband. The doctrine of derivative settlements is based on the idea of *obligation*, on the part of him through whom it is derived, to support the individual. But in the case of a *bastard* there is no such obligation on the part of either father, or mother. *Manchester v. Springfield*, 15 Vt. 385. *Manchester v. Rupert*, 6 Vt. 291. *Cumner v. Milton*, 2 Salk. 528. *Woodward v. Paulsbury*, 2 Ld. Raym. 1473. *Freetown v. Taunton*, 16 Mass. 52. *Wells v. Westhaven*, 5 Vt. 325. *Danbury v. New Haven*, 5 Conn. 584, and *Woodstock v. Hooker*, 6 Conn. 36, depend wholly upon the statute of Connecticut,—as does *Canajoharie v. Johnstown*, 17 Johns. 43, upon that of New York.

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We contend that the statute of 1817 was only intended to operate prospectively, and cannot affect the present case, where the bastard was born prior to its enactment. Under this statute it has been held, that a widow and her children may acquire settlements in their own right, and that the settlement of the children is not affected by the marriage of the mother;—and we do not see how a bastard can be any more subject to the mother's settlement.

The opinion of the court was delivered by
Royce, Ch. J. The case is brought here upon exceptions to the decision of the county court, first, in overruling the motion to quash the proceedings in reference to the family, and second, in sustaining the order of removal upon the merits.

The ground of the motion is, that the members of the family, besides the wife, are not named; and there are many precedents, both in England and this country, for quashing such proceedings as to the family, when it does not appear how the family was constituted. This is said to be for the reason, that the order and warrant may, in such a case, operate upon persons not liable to be removed with the pauper; as upon hired domestics, or temporary inmates of the household. But that reason fails in this instance, since the family is described as consisting of the pauper's wife and his four children. It is contended, however, that the defect is not cured, inasmuch as the children are not alleged to be minors. But we think the want of such an averment is not, in this case, fatal. For so long as it appears that they were the pauper's children, and living with him as part of his family, we should rather intend that they were dependent upon him as a parent, and subject to his parental control, than that they were adult children and emancipated.

The remaining inquiry regards the pauper's settlement. He was born in Essex in 1814, being the illegitimate son of a woman then having her settlement in that town. In 1827 the mother acquired a settlement in Jericho by marriage; and the question is, whether her minor son, the pauper, took that settlement, or retained his settlement in Essex.

It is certain, that, by common law, he could derive no settlement from his mother, since he would be regarded, for this purpose, as for nearly all others, as *nullius filius*. His place of birth would ne-

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cessarily be his place of settlement, unless fraud had been practised to occasion the birth to happen at that place, or the mother had been transported or conducted thither under legal authority. 1 Bl. Com. 363, 459. Reeve's Dom. Rel. 276. 3 Burns' Just. 357. *Manchester v. Springfield*, 15 Vt. 385. And the statute of 1801 (the only existing statute in relation to settlements, when this pauper was born) had no provisions touching derivative settlements. It did not intercept such as resulted from common law, as in the case of a wife, or legitimate child, nor did it confer any in the case of an illegitimate. The pauper, therefore, became settled in Essex, at his birth, by force of the common law.

The subsequent statute of 1817 enacted, that illegitimate children should have the settlement of their mother. But the statute, in its terms, being wholly prospective, ("settlements shall *hereafter* be acquired" &c.) it ought not to be made retrospective by construction. And hence it may be assumed, that the statute did not operate to supersede the existing settlement of the pauper by that of his mother, or to merge the former in the latter, when they had previously been distinct and independent.

This position is moreover established by the case of *Manchester v. Springfield*, before cited, which, so far as the statute of 1817 was concerned, is identical with the present statute. And as the mother's original settlement in Essex must be taken to have continued until her marriage in 1827, it follows, that the pauper never had her settlement before that event.

The question recurs, was the new settlement, which she then acquired, communicated to the pauper by the statute of 1817, and his own previous and independent settlement thereby determined? In regard to the settlement of married women, that statute was merely in affirmation of the common law. And it has hitherto been so considered in relation to the settlement of legitimate children. They "have the settlement of their parents," as well by force of the common law, as under the statute. But the common law does not give to children by a prior marriage the settlement, which the mother may acquire by a subsequent marriage. The reason is, that such children do not, as a matter of course, constitute any part of the new husband's family. He is not bound to provide for them, nor can his wife do so, without his consent. Consequently they retain the

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settlement, if any, which they had before such marriage of their mother. *Freetown v. Taunton*, 16 Mass. 52. *Dedham v. Natick*, Ib. 135. And thus far the statute in question has been regarded as operating precisely to the same effect. The reasons for the common law rule have lost none of their force by the passage of that statute.

But it is not perceived that any satisfactory distinction, in this respect, can exist between the cases of legitimate and illegitimate children. The statute is equally as positive, that the former shall have the settlement of their parents, as that the latter shall have the settlement of their mother. And a settlement acquired by a widow, otherwise than by marriage, (a settlement in her own right,) not only supersedes her previous settlement, if she had one, but is communicated to her minor children, and supersedes theirs. *Bradford v. Lunenburgh*, 5 Vt. 471. So a settlement, thus gained by the mother of an illegitimate child, would necessarily be followed by the like consequences. But unless the marriage of a mother could operate, under the statute of 1817, to change the settlement of legitimate children, it must be vain to contend that it should have that effect in the case of an illegitimate child.

But cases are cited from the neighboring states, which are claimed to have established a different doctrine. They will be found, however, to conclude nothing upon the construction of such a statute as that of 1817. The case of *Petersham v. Dana*, 12 Mass. 429, arose under their statute of 1789, which enacted, that an illegitimate child should be deemed to be *an inhabitant with his mother*, until he should gain a settlement in some other town, or district. And it was considered, that these words of the statute could not be satisfied, unless the settlement of the child became changed with that of the mother, even though hers was changed by marriage. So the case of *Cangoharie v. Johnstown*, 17 Johns. 43, turned upon the words in their statute—"last legal settlement of the mother;" the court remarking, that the very expression "last legal settlement" supposed that the mother's settlement might be changed. In Connecticut they appear to have recognised a peculiar and local common law, as applicable to the case of illegitimate children. Their doctrine would seem to be, that such a child does not take a settlement by birth, if the mother has a settlement within the state, but that he takes her settlement. But the case of *New Haven v. Newtown*, 12

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Conn. 165, is the only one recollectcd, in which a settlement of such a child, actually acquired by birth, was afterwards changed by a marriage of the mother. And that case was decided by a bare majority of the court.

The conclusion is, that, as in this instance, the new settlement of the mother was not acquired in her own right, it was not communicated to the pauper, and that he was therefore duly removed.

Judgment of county court affirmed.

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MATTHEW L. BARNEY v. WILLIAM S. DOUGLASS, and JOHN K. HUNT, Trustee. OLIVER SHEPARD, Claimant.

Where it appeared, that one summoned as trustee had executed to the principal debtor a negotiable promissory note, and that the note, before it became due, and before the service of the trustee process upon the trustee, had been, for a valuable consideration, indorsed and transferred by the principal debtor to one who now appeared as claimant in the case, and that, before the trustee received notice of the indorsement, service of the trustee process was made upon him, in his absence from the state, by leaving a copy at his house, and after this, but before the trustee had notice of the service, the indorsee gave notice to the trustee of the indorsement, it was held, that, under the statute of 1841, the plaintiff in the trustee process would hold the amount due from the trustee upon the note.

And it was also held, that a promise, made by the trustee at the time he received notice of the indorsement, and before he had notice of the service of the trustee process, to pay the note to the indorsee, not being made on any new consideration, did not change the rights of the parties, and would not entitle the trustee to be discharged, under the fifth section of chapter 29 of the Revised Statutes.

TRUSTEE PROCESS. It appeared that Hunt, who was summoned as trustee, executed a negotiable promissory note to Douglass, the principal defendant, bearing date September 14, 1843, and payable in sixty days; that on the twenty first day of September, 1843, Douglass, in good faith and for a valuable consideration, indorsed

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the note to Shephard,—who now appeared as claimant in the case; that on the fourteenth day of November, 1843, service of the writ in this case was duly made upon the trustee, in his absence from the state, by leaving a copy at his house; that on the twenty eighth day of November, 1843, and before Hunt had any knowledge of such service having been made, he was informed by one Huntington, as the agent of Shephard and at his request, that the note had been transferred to Shephard, and that Shephard would look to him for payment, and that Hunt thereupon answered "Very well, I will pay it"; and that afterwards, on the same day, Hunt first had knowledge of the service of the trustee process upon him.

The county court decided, that the trustee was chargeable for the amount of the note. Exceptions by claimant and trustee.

C. D. Kasson for claimant and trustee.

1. The trustee became liable to the claimant, by promising to pay the note to him, before he had knowledge of the trustee process. This brings the case within sect. 5 of chap. 29 of the Revised Statutes.* The claimant's right to the note, as against the principal debtor, accrued prior to the right of the plaintiff; and the claimant first gave to the trustee actual notice of his claim. Actual notice should take precedence of constructive notice. *Van Staphorst et al. v. Pearce*, 4 Mass. 258. *Dix et al. v. Cobb & Tr.*, Ib. 510. *Foster v. Sinkler et al.*, Ib. 450. *Williams et al v. Marston & Tr.*, 3 Pick. 65. *Ammidown v. Wheelock*, 8 Pick. 470.

2. The statute of 1841 does not in fact extend to cases of notes transferred in *good faith*, but only to cases where negotiable paper is transferred in bad faith, to avoid creditors.

F. G. Hill for plaintiff.

Negotiable paper, whether under or over due, is made subject to trustee process. Acts of 1841, p. 6. This leaves the question as it

*By which it is enacted, that "If, after the service on the trustee, but before he has any knowledge thereof, he shall, in good faith, make any payment, or become in any way liable to a third person, for, or on account of, the goods, effects, or credits, in his hands," &c., "he shall be allowed therefor, in the same manner as if the payment, or delivery, had been made, or the liability incurred, before the service of the writ on him."

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was when the case of *Britton v. Langley & Tr.*, 9 Vt. 257, was decided. The promise made by the trustee to the claimant did not impose upon him any liability, within the meaning of sect. 5 of chap. 29 of the Revised Statutes. There was no new consideration passed,—no new contract substituted for the note, on which Shephard could claim a right to sustain a suit, or by which Hunt could delay payment, or defend against the note. Shephard has no greater rights against Hunt now, than he would have had, if Hunt had made no reply, when notified of the transfer,

The opinion of the court was delivered by

Royce, Ch. J. In this case, judgment having passed against the principal defendant, and the trustee having admitted himself indebted upon a negotiable promissory note executed by him to the principal defendant, one Shephard appeared and interposed his claim to the note ;—and the validity of that claim, as against Barney, the attaching creditor, is the only matter to be now determined.

The case finds, upon the disclosure and other evidence, that the note was indorsed in good faith, and for sufficient consideration, by Douglass to Shephard, before the same fell due ; that the trustee process was served on the trustee in his absence, by leaving a copy at his house in the manner provided by law in such a case ; and that, after such service, and before the trustee had personal notice of it, Shephard gave him notice, by an agent, that he was the assignee, holder and owner of the note.

Thus far it is clear, that the attaching creditor is entitled to hold against the claimant. The attachment was perfected by the service made, and did not require personal notice to the trustee, in order to bind the effects in his hands. That it was a full and perfect service appears by a comparison of section seven of the trustee statute with the law prescribing the mode of serving a writ of summons, and is necessarily implied in section five of the trustee statute, which provides for a case where the process has been served upon the trustee, and he has continued to act in ignorance of that fact. Now the statute of 1841 has subjected negotiable paper, whether under or over due, to the trustee process, “unless it shall appear, that the same had been negotiated and notice thereof given to the maker,

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or indorser, before the service of the process on him." And here there was a legal service of the process before such notice.

But the claimant insists, that his right is saved by section five of the trustee statute, which provides that the trustee shall be protected for any payment made to the principal defendant, and for any liability incurred to a third person, although the process shall have been previously served upon him, if he had, at the time, no knowledge of the service.

It appears that when the trustee was notified by the agent of Shephard, as before stated, he was told that Shephard would look to him for pay on the note, and he replied, "Very well, I will pay it." The question is, whether these expressions, under the circumstances, created such a liability of the trustee to a third person, as the statute contemplates. It is not enough, that they should operate to abridge the defence which he might otherwise make to the note; they must constitute a substantive ground of liability, a direct cause of action, which could be enforced by suit.

Had these expressions been used in reference to some demand, held and owned by Shephard, which could only be sued in the name of Douglass, they might, if so intended, have furnished a new cause of action to Shephard, the assignee; *Moor v. Wright*, 1 Vt. 57, and *Bucklin v. Ward*, 7 Vt. 195. But here the legal right of action upon the note was already in Shephard by the indorsement, as much so, as if the note had been originally executed to him. What, then, was the effect of the trustee's declaration to him, or his agent, that "he would pay the note?" As before remarked, it may possibly have precluded him from making certain defences to the note, which he might otherwise have set up; but we think it gave no new cause of action to Shephard. It was but a promise to do that, which the note, and the indorsement of it to Shephard, already bound him to do. It was not an undertaking to pay more, or less, than the amount of the note, or to pay it in a different manner, or at another time. Nor was it founded on any new consideration, nor intended to furnish to Shephard any new remedy. Hence the only action, which Shephard could bring, would be an action directly upon the note, and not upon this oral promise of the maker.

Judgment affirmed.

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CLARK D. HATHAWAY v. GEORGE G. RICE.

In an action of trespass, where the declaration contains several counts, a plea, which commences and concludes in bar of the action generally, and the obvious and natural import of the language of which should be understood in a plural and distributive sense, as applying to the different occasions on which the trespasses are charged, must be taken as a plea to the whole declaration.

A plea to the whole declaration, to be sufficient, must appear to contain an answer to all that is alleged as the direct ground and gist of the action, and such answer must be valid and sufficient in law.

Matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by the defendant, on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of.

But a declaration, which charges the defendant with having struck the plaintiff a great many violent blows with a club, and with a raw hide, and with his fist, and with having, with great violence, shaken the plaintiff and pulled him about, and with having thrown down the plaintiff and then harshly and brutally kicked him and struck him other violent blows, and with having wounded him, and torn his clothes, exhibits a mere succession of acts of direct trespass, all remediable by an action of the same class, and each requiring some complete justification, or excuse, in the plea.

But a plea to such declaration, which professes to answer the "assaulting, beating and ill treating," using the explanatory words, "as in the declaration mentioned," will be considered as co-extensive with the alleged cause of action.

But it was held, that a plea to a declaration alleging such acts of trespass, which averred, merely, that the defendant was a school master and the plaintiff was his scholar, and that the plaintiff was insolent and refused to obey the reasonable commands of the defendant, and thereupon the defendant moderately chastised him, and which set forth no acts on the part of the plaintiff requiring excessive severity on the part of the defendant, such as resistance by the plaintiff,—did not disclose a *sufficient* justification in law, for the acts alleged in the declaration.

TRESPASS for assault and battery. In the first count in the declaration it was alleged that the defendant, on the first day of January, 1845, laid hold of the plaintiff and with a club and with his fists

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struck him a great number of violent blows upon his head and body, and shook and pulled him about, and threw him down, and then harshly and brutally kicked him and struck him other violent blows, and wounded him, and tore his clothing. In the second count an assault and battery was alleged, in common form, to have been committed by the defendant upon the plaintiff on the same day. In the third count it was alleged, that the defendant, on the fifth day of January, 1845, laid hold of the plaintiff with great force and violence, and with a raw hide, and with clubs, sticks, fists and feet, gave to the plaintiff a great many violent blows upon his head and body, and with great violence shook and pulled him about, and threw him down, and struck him other violent blows, thereby wounding him, and tore his clothes. In the fourth account it was alleged, in common form, that the defendant, on the fifteenth day of January, 1845, committed an assault and battery upon the plaintiff.

The defendant pleaded the general issue, and also a special plea, which was in these words ;—“ And for farther plea in this behalf, ‘as to the said assaulting, beating and ill treating the said Clark, in ‘his declaration mentioned, the said George, by leave of the court ‘first had and obtained, says, that the said Clark ought not to have or ‘maintain his aforesaid action thereof against him, because he says, ‘that before and at the several times in the plaintiff’s declaration ‘mentioned, to wit, at Burlington aforesaid, the said George was in-‘structor, teacher and master of a public, or common, school, to ‘wit, the school of district No 9 in said Burlington, and the said ‘Clark D. was, at the said several times in his declaration men-‘tioned, as aforesaid, at Burlington aforesaid, a scholar and pupil of ‘the said George in his said school, and then and there behaved and ‘conducted himself saucily and contumaciously towards the said ‘George, and then and there refused to obey his lawful commands, ‘relating to his duty as such scholar and pupil, as aforesaid ; where-‘upon the said George then and there moderately corrected him, the ‘said Clark D., for his misbehaviour, as aforesaid ; which are the said ‘assaulting, beating and ill treating the said Clark D., in his decla-‘ration mentioned : And this he is ready to verify : Wherefore he ‘prays judgment, if the said Clark D. ought to have or maintain his ‘aforesaid action thereof against him, and for his costs.”

To this plea the plaintiff demurred, and assigned the following as

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special causes of demurrer. 1. That it does not appear with sufficient certainty from the plea, whether it was intended to answer the whole declaration, or what part thereof, or which of the counts. 2. That the plea, in the introductory part, assumes to answer only one assaulting, beating and ill treating of the plaintiff, while in the body of the plea the several assaultings, beatings and ill treatings are attempted to be justified. 3. That the plea does not answer but two of the substantive allegations in the first and third counts of the declaration, leaving the other allegations in those counts, namely, the throwing down and kicking the plaintiff and tearing his clothes, unanswered. 4. That the plea does not allege, that the defendant had a *lawful right* to correct the plaintiff, as mentioned in the plea. 5. That the plea does not allege, that the defendant used no more force than was necessary to moderately correct the plaintiff for his alleged misbehavior. 6. That the plea does not state what correction the defendant did make use of, or how much, or in what manner, he moderately corrected the plaintiff, so that it may be determined from the plea whether the correction was moderate, or not.

The county court, September Term, 1845,—BENNETT, J., presiding,—adjudged the plea in bar sufficient. Exceptions by plaintiff.

Briggs & Underwood and Lyman & Chittenden for plaintiff.

1. The plea, as it prays judgment of the whole declaration, must be a perfect answer to the whole, or it is defective. It is not one of those cases, where, by answering one substantive allegation, the whole action is defeated; but it requires a plea co-extensive with the trespasses set forth in the declaration. Even if the plea is a sufficient answer to one count, or more, it will not avail; because, if it did not cover the whole declaration, that part, which it was intended to answer, should have been pointed out and judgment prayed for that part only. *Nevins v. Keeler*, 6 Johns. 63. *Hallett v. Holmes*, 18 Ib. 28. *Van Ness v. Hamilton*, 19 Ib. 349. *Spencer v. Southwick*, 11 Ib. 583. *Jackson v. McClaskey*, 2 Wend. 541. 1 Chit. Pl. 454. *Hickok v. Coates*, 2 Wend. 419. *Slocum v. Despard*, 8 Ib. 615. *Gillespie v. Thomas*, 15 Ib. 464. *Riggs v. Denison*, 3 Johns. Cas. 198. *Fletcher v. Peck*, 6 Cranch 87. *Barnard v. Duthey*, 5 Taunt. 27.

2. The plea answers but two of the substantive allegations in the

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declaration. The wounding, tearing clothes, &c., cannot be considered mere matter of aggravation. *Pendleburg v. Elmott*, Cro. Eliz. 268. *Trescott v. Carpenter*, 1 Ld. Raym. 229. *Stanners v. Yearsley*, 25 E. C. L. 19. *Bush v. Parker et al.*, 27 Ib. 312. *Reece v. Taylor*, 30 Ib. 388. *Dutton et al. v. Holden*, 4 Wend. 643. *Underwood v. Campbell*, 13 Ib. 78. *Gregory et ux. v. Hill*, 8 T. R. 299. Story's Pl. 535. 4 Taunt. 821.

3. The declaration avers three distinct trespasses, committed on the first, fifth and fifteenth days of January;—the plea justifies but one.

4. The plea denies none of the excessive force and violence averred in the declaration, nor does it allege any excuse for its exercise. The declaration sets forth trespasses of such an aggravated character, as cannot be justified by any relation known to the common law, without alleging some sufficient act of the plaintiff as an excuse for their commission,—as *resistance, son assault demesne*, &c.; and then he must negate the using of more force than was necessary, either by expressly alleging it, or by the common allegation, that he committed the trespasses, “*as he lawfully might, for the cause aforesaid.*” *Trescott v. Carpenter*, 1 Ld Raym. 229. *Gregory et ux. v. Hill*, 8 T. R. 299. Story's Pl. 535. We are unable to see, how the definition of moderate correction can be extended to include a bruising and wounding,—or, at all events, how it can cover a destruction of goods and chattels.

J. McM. Shafter for defendant.

1. The plea answers “the *said* assaulting, beating and ill treating the said Clark, *as in his declaration mentioned*,” in its introductory part. In the body of the plea assaults and battery are confessed at “the several times” mentioned in the declaration, and are justified, as being the same trespasses complained of. This is a full and certain answer to the declaration. *Michell v. Neale et ux.*, Cowp. 828. *Burgess v. Freelove*, 2 B. & P. 425. *English v. Purson*, 6 East 395. The third special cause of demurrer proceeds upon the ground, that it is necessary to answer every *particular* of the charge in the declaration. To do this would lead to answering matters of aggravation, as well as those forming the gravamen of the charge, and to a needless and endless prolixity; and if the plaintiff intended

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to rely upon an excess of violence, he should have new assigned. *Gale v. Dalrymple*, 1 C. & P. 381. *Thomas v. Marsh et al.*, 5 C. & P. 596. *Taylor v. Cole*, 3 T. R. 292; *S. C.*, 1 H. Bl. 555. *Gates v. Bayley*, 2 Wils. 313. *Green v. Jones*, 1 Saund. R. 295, n. 6. 2 Ib. 411, n. 4. Gould's Pl. 366.

2. The general demurrer denies the right of a school master to administer moderate correction to his pupil. The principle, that a parent might correct his child, for his admonition and reproof, has always been recognized. The instructor in the public schools is held to have a delegated authority from the parent, which is limited to the purposes for which it was given,—the proper education of the individual pupil, and the preservation of order and government in the schools. 1 Bl. Com. 373, 374. 2 Kent 205. 1 Selw. N. P. 34. Rast. Ent. 613, *pl.* 18. We claim, also, that the school master is a *quasi* public officer, having charge of a public interest; that if his jurisdiction is limited, yet that within his limits his acts are governmental in their nature, and that every intendment is to be made in his favor.

The opinion of the court was delivered by

ROYCE, CH. J. This must be taken as a plea to the whole declaration. It commences in bar of the action generally, and proceeds to allege, that, before and at the *several times* in the declaration mentioned, the defendant was a school master and the plaintiff was his scholar,—that the plaintiff was *then and there* guilty of the insolence and disobedience alleged,—*whereupon* the defendant corrected him, &c. And in order to give to this language its obvious and natural import, it should be understood in a plural and distributive sense, as applying to the different occasions on which the trespasses are charged. The plea also concludes in bar of the entire action. And there is, moreover, an established rule, that every plea shall be treated as a plea to the whole declaration, unless it is expressly limited to some particular portion. Gould's Pl. 362.

We must, then, inquire, whether the plea is sufficient, considered as a plea to the whole declaration. To be so, it must appear to contain an answer to all that is alleged as the direct ground and gist of the action, and such answer must be valid and sufficient in law.

In regard to the first of these requisites the defendant insists, if

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any of the acts charged in the declaration are not comprehended within the terms used in the commencement of the plea, and consequently are not attempted to be justified, that those acts should be considered as matters of aggravation merely, and, as such, not requiring any justification. But matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by the defendant, on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of. As where the plaintiff declares in trespass for breaking and entering his dwelling house, and alleges, in addition, that the defendant also destroyed his goods in the house, assaulted and beat his domestics, or debauched his daughter, or servant. Now, conceding that for some or all of these acts the plaintiff might support trespass, yet it could only be done by an essential change in the frame and technical character of his declaration. And hence they would be regarded as matters alleged for the purpose of aggravating the trespass declared upon, by showing the motive with which it was committed, unless, upon a justification being pleaded, the plaintiff should see fit to waive his first and ostensible cause of action, and set them forth in a replication, or new assignment, as distinct and substantive grounds of recovery. *Taylor v. Cole*, 3 T. R. 292. *Hubbell v. Wheeler*, 2 Aik. 359.

In this instance, however, all the grievances charged must be looked upon as acts of direct trespass to the plaintiff's person, and all remediable by an action of the same class and denomination. And in *Bush v. Parker et al.*, 27 E. C. L. 312, where the declaration charged assaulting, seizing and laying hold of the plaintiff, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him, and the plea justified assaulting, seizing and laying hold of the plaintiff, and pulling and dragging him about, it was held, that the alleged grievances, which the plea omitted to notice, were in themselves trespasses, requiring to be justified. TINDAL, Ch. J., says,—“It is plain, that they are links in a chain of trespasses, following each other, and not mere aggravation of the first assault.” And, in our opinion, it is no less evident, that, aside from the averment of certain special damages as consequent upon the acts charged,

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the present declaration exhibits a mere succession of trespasses, each requiring some competent justification, or excuse.. It therefore becomes necessary to determine in how extensive a sense the words "assaulting, beating, and ill treating," as used in the introductory part of the plea, shall be understood and applied. When the defendant in a case of this kind would plead in bar generally, he may commence his plea with such a general reference to the charges contained in the declaration, as will necessarily embrace the whole subject of complaint, or he may, as in this case, set down in detail the several alleged acts which he proposes to justify. But in the latter case the justification is usually confined to the acts thus specified; so that, if the declaration alleges a mayhem, or a wounding and knocking the plaintiff down, and the plea is silent in these particulars, such charges will not, in general, be held to come within the scope of the justification.

Now the declaration, in alleging the trespasses committed, goes far beyond the necessary legal import of the introductory terms used in this plea; for neither of these is held, *ex vi termini*, to include an actual wounding, or such other acts of extreme violence and severity as the declaration charges. *Titley v. Foxall*, Willes 688. *Williams v. Jones*, 2 Str. 1049. Ham. N. P. 149. And hence those terms, without the explanatory words, "as in the declaration mentioned," would not, as I think, render the plea sufficiently comprehensive to meet the whole declaration. But, with the aid of these expressions, the plea may be understood as assuming to justify the assaulting, beating, and ill treating, precisely as they are described and set forth in the declaration. And if so, it is co-extensive with the alleged cause of action.

We are brought, then, to the question, whether a sufficient justification is disclosed for all that is alleged against the defendant. The plea is based upon the right of a school master to correct his scholar, a right which has always been practically and judicially sanctioned. But it rests upon similar ground as the right to correct a child, or servant, and the chastisement must not exceed the limits of a moderate correction. 1 Hawk. P. C. 130. 1 Stephen's N. P. 219. And though courts are bound, with a view to the maintenance of necessary order and decorum in schools, to look with all reasonable indulgence upon the exercise of this right, yet, whenever the cor-

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rection, as confessed by the pleadings, or as proved on trial, shall appear to have been clearly excessive and cruel, it must be adjudged illegal.

The matter may, indeed, be so presented by the pleadings, that the court would not be able to decide, from them alone, whether the master had abused his authority; as where the plea of moderate correction proceeds to allege resistance by the scholar, so that the acts of the master should be referred, in part, to self defence. The plea would then become somewhat analogous to that of *son assault desne*, and whether an excess of force had been used, could, in general, be determined only by the evidence on trial. But such is not the case upon these pleadings. It is therefore as competent for the court to test the merits of this plea upon demurrer, as to determine when the plea of *molliter manus imposuit* is a good answer to the charges in a declaration. The latter plea will justify acts which amount to assault and battery in law, as the forcible expulsion of a person from one's house, or land, when he refuses to leave it on request. But since the party, if unresisted, can exercise his right in such a case without violence and outrage, such a plea, without more, is not sufficient, when the declaration alleges the infliction of severe blows, a wounding of the plaintiff, or knocking him down. The plea must therefore aver some adequate excuse for such acts of severity; as that they were rendered necessary by the plaintiff's resistance. *Gregory & wife v. Hill*, 8 T. R. 299. *Oaks v. Wood*, 2 M. & W. 791.

Considerations of a similar bearing are applicable here. We cannot know the precise degree of severity which the occasion called for, but nothing is disclosed to justify the defendant in proceeding to extraordinary lengths. If any such ground existed, it should have been placed upon the record. As the case now appears, we have no difficulty in saying, that the chastisement was carried far beyond the limits of a moderate correction.

Judgment of the county court reversed, and judgment that the plea in bar is insufficient.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF FRANKLIN.
JANUARY TERM, 1847.

PRESENT,
Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. MILO L. BENNETT,
Hon. DANIEL KELLOGG,
Hon. HILAND HALL, } ASSISTANT JUDGES.

ALANSON L. WRIGHT v. NATHAN SMITH.

An award is not void for uncertainty, which provides that one of the parties shall pay the "taxable costs" of a suit which had been pending in court.

But, to entitle the plaintiff to recover upon such an award, he must aver in his declaration that the *taxable costs* amounted to a certain specified sum, of which the defendant had *notice* before suit brought; and if this averment is omitted, the declaration is bad upon demurrer.

The general rule of pleading is, that, when matter is more peculiarly within the knowledge of one of the parties than of the other, notice is necessary, although the terms of the contract do not require it.

DEBT upon an award. The declaration contained two counts, the first of which was traversed and the issue found for the defendant. In the second count the plaintiff alleged, that a suit had been pending in his favor against the defendant and his son, that the de-

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fendant agreed with him, by bond, to submit the matter in controversy to arbitration, and that the arbitrators made an award, by which they ordered, that the defendant should pay to the plaintiff his "taxable costs" in the suit pending between them; and the plaintiff averred, that said "taxable costs" "amounted to a large sum, to wit the sum of sixty dollars, and that afterwards &c. he demanded the same" of the defendant, and that the defendant neglected and refused to make payment.

The defendant craved oyer of the bond of submission and award and set forth the same at length, and pleaded, that he had performed all things on his part to be performed, except paying the said taxable costs, and that he had been at all times ready to pay those, but that the plaintiff had never, before the commencement of this suit, taxed them, nor caused them to be taxed. To this plea the plaintiff demurred.

The county court, September Term, 1844,—ROYCE, J., presiding,—adjudged the plea insufficient. Exceptions by defendant.

After argument by *O. Stevens* and *H. E. Seymour* for plaintiff, and by *Smalley & Adams* for defendant, the opinion of the court was delivered by

BENNETT, J. We think there is no objection to the validity of the award, on the ground of uncertainty. "That is certain, which can be rendered certain." The award enjoins upon the defendant the payment of the *taxable costs* in the suit referred to. The law prescribes what items constitute what are called *taxable costs* in any given cause; and the facts being given, the sum total of the *taxable costs* is readily ascertained.

To have entitled the plaintiff to recover, he should have averred in his declaration, that the *taxable costs* amounted to a sum certain, of which the defendant had notice before suit brought.

The rule in pleading seems to be, that, when matter is more peculiarly within the knowledge of one of the parties, than the other, notice is necessary, though the terms of the contract do not require it. The question, then, is, was the amount of the *taxable costs* in the suit referred to in the award more peculiarly within the knowledge of the plaintiff, than the defendant. We think this is settled by authority. In *Harris v. Ferrand*, Hardr. 42, the doctrine is advanced, that,

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upon a promise to pay all costs in a suit referred to, there must be, before the action is brought, notice of the amount; and Comyns cites this case with approbation;—Com. Dig., Pleader C 73. In *Barnes v. Parker*, 8 Metc. 134, the promise was to pay the costs taxed &c.; and notice was required in that case. In *Safford v. Stevens*, 2 Wend. 158, the promise was, to pay the *taxable* costs; and the court held there must be notice of the amount. The expenditures for witness fees, costs of subpoenas and service, &c., to which a party may be subjected in prosecuting or defending a suit, and which would constitute proper items of taxation, are peculiarly within the party's own knowledge.

The award is to pay the *taxable* costs. We do not think, that this necessarily requires, that the costs should have been in fact taxed by the proper officer. If the award had been to pay the *taxed costs*, it might have been so. *Taxable* costs means such as the party was entitled to have taxed by law; and the amount may well be ascertained without an actual taxation either by the court, or clerk, and notice may be given of the amount. The averment in the declaration, that the taxable costs amounted to a large sum of money, to wit, the sum of sixty dollars, we think is sufficient in that respect; but there is no allegation, that the defendant had notice of the amount before suit brought. The allegation, that the plaintiff demanded of the defendant sixty dollars, is not an allegation of notice, that the *taxable costs* amounted to that sum.

The result to which we have come is, that the declaration is insufficient in this particular.

The clerk will enter the judgment of the county court reversed, and judgment that the plea in bar to the second count in the declaration is sufficient, and that the defendant recover his costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF GRAND ISLE,
JANUARY TERM, 1847.

PRESIDENT,
Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. MILO L. BENNETT, } ASSISTANT JUDGES.
Hon. HILAND HALL,

JAMES TOBIAS v. JOHN McGREGOR, JR.

Under the provisions of the Revised Statutes, which entitle a defendant, who has a demand on book against the plaintiff, to file a declaration in offset, the defendant has no right to file a declaration in the form of an action of account. The statute contemplates a declaration on book account.

If, in such case, the defendant file a declaration in account, and judgment to account is rendered, and an auditor is appointed and the case continued, the county court may nevertheless, in its discretion, at a subsequent term, sustain a motion to dismiss such declaration.

THIS was a declaration in offset, in the usual form of an action of account, filed in the county court at the April Term, 1846, at which term an action of assumpsit in favor of this defendant against this plaintiff was entered in court. The defendant entered an appearance in the action upon the docket of the court, and judgment to

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account was rendered, an auditor was appointed, and the action was continued. At the September Term, 1846, of the county court the defendant moved to dismiss this action, for the alleged reason that the declaration was improperly filed; and the court,—BENNETT, J., presiding,—sustained the motion and dismissed the action. Exceptions by plaintiff.

William W. White, for plaintiff, contended, that the case came within the meaning and spirit of chapter 34 of the Revised Statutes, and that, at all events, the defendant was too late in filing his motion, and cited *Eaton v. Houghton*, 1 Aik. 380; *Stone v. Proctor*, 2 D. Ch. 108; Gould's Pl. 34, 231; 1 Chit. Pl. 441-7; 1 Saund. Pl. & Ev. 1; Washb. Dig. 579, § 83; 17 Vt. 634.

G. Harrington, for defendant, claimed, that the decision of the court below was within its discretion and could not be revised by this court, and cited *Probate Court v. Hall et al.*, 14 Vt. 159; *Ainsworth v. Drew*, Ib. 563; *Richards et al. v. Wheeler*, 2 Aik. 161.

The opinion of the court was delivered by

BENNETT, J. The eighth section of chapter thirty-four of the Revised Statutes, p. 213, provides, that if the defendant, in any action pending in the county court, shall have a demand *on book* against the plaintiff, which cannot be pleaded as an offset, he may file a declaration in such court, setting forth the nature of such demand; which is made sufficient notice to the adverse party; and the statute declares, that the same proceedings shall be had thereon, *as if the action on book had been commenced in the usual form*. The ninth section provides, that when a *declaration on book is so filed*, the court shall proceed to trial on such declaration, previous to the trial of the original declaration. The tenth and eleventh sections of the statute also speak of the filing *such declaration*,—that is, a *declaration on book*.

Our action *on book* is a creature of the statute; and though the proceedings in it are in an analogy to the proceedings in the common law action of account, yet it is a distinct action from that, and is not an appropriate remedy, in cases in which the action of account is brought. It has always been the practice to confine the remedy under the eighth section to a declaration appropriately in

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form a declaration on book. We have no doubt, considering the different sections, that this practical construction of the statute is the sound one. No question, then, can be made, but that, if the motion to dismiss had been made at the same term of the court in which the declaration was filed, it should have prevailed.

It is however urged, that it was error in the county court to dismiss the declaration at the subsequent term, after the proceedings detailed in the bill of exceptions had been had. But we think not. In the case of *Cross et al. v. Haskins*, 13 Vt. 540, it was held, that a declaration filed on book, under the eighth section of chap. 34 of the Revised Statutes, was not to be regarded as a distinct entry, but simply as a pleading in the original action, and as a branch of that cause. So in this case, the declaration, which the defendant in the original action filed, must be regarded as a part of the pleadings in that suit.

The doctrine of those cases, in which it is held, that any irregularity in the process is waived by the defendant's pleading to the merits of the action, has no application to this case. It was competent for the county court, in the exercise of a sound discretion, to entertain the motion to dismiss the declaration, filed for the purpose of procuring an offset, though made at the second term, and after judgment to account. This court cannot say, that there was error in the decision of the county court on the motion to dismiss, arising out of the time, simply, when they entertained the motion; and it is clear, that the defendant had no right to file a declaration in the common law action of account, under the statute.

The result is, the judgment of the county court is affirmed,

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON.
JANUARY TERM, 1847.

PRESENT,
Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. ISAAC F. REDFIELD,
Hon. MILO L. BENNETT, } ASSISTANT JUDGES.
Hon. HILAND HALL,

STATE v. MOSES GOODRICH.

Where a respondent was indicted for discharging a gun at a person and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the respondent, it was held, that the respondent might prove the declarations of the witness, made while on his way to the place where the affray happened,—the witness, upon being inquiry of on cross examination, having denied them. And *quare*, whether such declarations and the acts of the witness, while going to the place, might not be proved without inquiry on cross examination, as showing the intent with which he went there.

In such case evidence might be proper of previous threats made by the witness as to the respondent, and of previous affrays between them, if so connected with the affray in question as to have any tendency to show that the respondent, at the time, had just cause of alarm, and to fear serious injury.

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to his person, or property. But where a case is so indefinitely stated upon the bill of exceptions, as to leave it uncertain how far evidence offered was admissible, it will not be presumed that there was error in the court below in rejecting the evidence.

INDICTMENT for assault and battery upon one Green by firing at him with a gun. Plea, not guilty, and trial by jury, June Term, 1846,—Bennett, J., presiding.

On trial evidence was given tending to prove that a quantity of hay had been attached, at the suit of Green against the respondent, as the property of the respondent; that on the evening of the 16th of October, 1845, Green and one Conner, at the request of the constable who made the attachment, went to the house of the respondent, where the hay was, for the purpose of seeing that the hay was safe and not in any way wasted; that they arrived there between nine and ten o'clock in the evening; and that while quietly there, making no disturbance, the respondent fired his gun, loaded with powder and shot, upon Green and wounded him.

The respondent claimed, that the assault and battery, if committed by the respondent, were committed by him in defence of his person, or property; and offered evidence tending to prove that there had, at previous times, been affrays at the dwelling house of the respondent, and that his house had been attacked and his property destroyed, and that Green was one of the company, and that Green had frequently threatened violence upon the person of the respondent. The court decided, that it was not competent, as defence to this prosecution, to inquire into previous affrays or contentions between the respondent and Green, and excluded the evidence offered, but admitted evidence to show all that took place on the evening, or night, when the affray complained of took place, tending to show that the assault and battery complained of were committed in defence of the person, or property, of the respondent.

Green, who was a witness on the part of the prosecution, was asked by the respondent, on cross examination, whether he did not say to a certain person, while he was on his way to the house of the respondent on the evening when the affray complained of took place, that we wanted to get some powder for the purpose of blowing up the house of the respondent; and Green denied that he so said. The

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respondent then offered to prove that Green did so say; but the court excluded the evidence.

The jury returned a verdict of guilty. Exceptions by respondent.

Linsley and Beckwith for respondent.

1. The degree of force a man may use in resisting an attack on his person, or property, especially in the night, depends very much on what he may reasonably consider the nature of that attack. If his house and property have been attacked by a mob on one night, and an attack apparently similar is made the succeeding night, he would be clearly justified in resorting to the greatest force immediately.

2. The witness to contradict Green should have been admitted. The question was not collateral. Whatever Green said, at the time, in reference to his purpose in going to the respondent's house, was evidence to contradict his statements made on the trial.

G. W. Grandy, state's attorney.

1. The testimony offered in reference to former affrays and controversies was properly excluded. A provocation, which will justify an assault and battery, must occur at the time of the affray; otherwise it cannot well be urged that the party acted in *self defence*.

2. The question put to the witness, Green, on cross examination, was in regard to a fact clearly collateral to the issue. His answer was on that account conclusive. 1 Stark. Ev. 134. 12 Vt. 585.

The opinion of the court was delivered by

REDFIELD, J. The question made in the defence of the present case was, whether the principal witness on the part of the state, upon whom the defendant is charged with making an assault, did himself make the first assault, and whether what the defendant did was done in *self defence*. Green testified, that he did not make any disturbance about the defendant's dwelling, or assault upon his person. He was then asked if he did not, while on the way to the defendant's house, on the night of the affray, declare to a particular person, that he wanted some powder to blow up the defendant's house,—which he denied. The defendant then offered to show, that he did make

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such declaration; and the court rejected the evidence, upon the ground that the inquiry concerned a matter wholly collateral to the main issue.

It is not always easy to determine precisely what is collateral to the main issue. Something on that head must be left to the discretion of the judge presiding at the trial. In the present case, if it was material to know with what *intent* the witness went there, that could only be shown by his acts and his declarations in connection with those acts. For this purpose the efforts and inquiries, which the witness made, for help and implements, whether of offence, or defence, would be material.

As part of that intent it might have been shown, that he declared his intention to be only to see if the hay remained; and we apprehend, what is stated in the bill of exceptions, in regard to the tendency of the testimony on the part of the state, to show that he went there *with that intent*, must have been derived, partly, at least, from his declarations on the way and while there. That is the only way it could be shown, aside from his own testimony. And we think, that all his declarations from the time of his setting out on this expedition, in connection with his acts, are competent, to show with what intent he went there;—and if an innocent intent may be shown in this way, then the contrary may also be shown in the same manner, and this may be shown by Green, or any other witness; and in this view the evidence was in no sense collateral.

If, then, Green denied making such a declaration, it might be shown, that he in fact did, both as tending to impeach the witness by contradicting him, and as going to establish the fact, that he went there for the purpose of beginning an affray, and as tending to justify, perhaps, more vigorous defence of any supposed offensive movements on the part of Green. For a part of the evidence rejected was, that he had repeatedly threatened the defendant; and it is not impossible, that if this evidence had been admitted by the court, the defendant might have satisfied the jury, that he had been informed of the fact of Green's approach, and of his declarations of his intent,—although, from the case, this seems hardly probable.

But these declarations are material, as showing the intent with which Green went there, and also his feelings towards the defendant; and it has been held, both in this state and in England, that this last

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point is a sufficient ground of impeaching a witness, and that the declarations of the witness to this effect may be shown, as substantive matter of proof, without first inquiring of him. *Lord Stafford's case*, 7 Howell's State Trials 1400,—where it was permitted to be shown, that the witness had attempted to suborn witnesses to testify falsely against the prisoner. So in *Thomas v. David*, C. & P. 350, where a female witness was offered, on the part of the plaintiff, to prove a promissory note, claimed to be forged, it was permitted to ask the witness if she was not the kept mistress of the plaintiff, for the purpose of showing, that she had a motive to favor the plaintiff, or was easily controlled by him, and might thus be induced to give false evidence. And, upon the witness denying it, she was contradicted by other witnesses,—the court holding the matter *not collateral*. So it is always competent to ask a witness, if he has not *said*, he would be revenged upon the party, against whom he is called, and this with reference to the very suit on trial, and, if the witness denies having made such declarations, to contradict him, by showing that he did make them. 2 Camp. 638. And in *Pierce v. Gilson*, 9 Vt. 216, it was permitted to show, that an ill state of feeling existed, on the part of the witness, as to the party against whom he was called, and this, *without first asking the witness*.

Whether, then, we consider the declarations of Green as tending to show, that he went there for the purpose and with the intent of making a serious assault upon the defendant, as a part of the *res gestae*, and tending to characterize the whole transaction, both as to the defendant and the witness, and their several acts, and thus the better to enable the heirs to determine, whether the one, or the other, was the aggressor, and whether the defendant acted in good faith in the matter,—or as tending to show the state of mind, which the witness entertained towards the defendant, and the temptation, which he would have to put the most favorable construction upon his own acts and the most exaggerated one upon those of the defendant, the evidence was clearly admissible,—and probably without first inquiring of the witness,—and also as tending to impeach the witness, by contradicting his main evidence,—in which view he must first be inquired of. 1 Stark. Ev. 189, 199.

Upon the other point the case is too indefinitely stated, to determine, with much certainty, how far the evidence was admissible.

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If the decision was intended to exclude all evidence of previous threats, or affrays, on the part of the witness, as to the defendant, unless upon that very night, it *might* be clearly wrong, and would be, if the testimony had any tendency to show, that the defendant, at the time, had just cause of alarm and to fear serious injury to his person or property. A case might have been made out, coming within the offer, which would have justified the defendant, even if he had taken the life of the witness ; and the decision of the court, in the terms in which it is expressed, would have rejected it, unless occurring at that very time. But we are not to presume any such case was proposed to be made out by the defendant, or it would have been admitted by the court. We rather presume, that the offer was intended to show, that the defendant and witness had had frequent quarrels,—which was not farther important, than as it tended to show the temper and disposition of the witness Green ; and not having been offered for any such purpose, it is impossible for us to say there was error in rejecting it.

Judgment that the verdict be set aside, and the respondent have a new trial. Cause remanded for that purpose.

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NATHAN MYRICK v. FRANCIS SLASON, THEODATUS PHELPS AND
EDGAR L. ORMSBEE.

Where the parties entered into a contract under seal, by which the plaintiff was to open a marble quarry belonging to the defendants and furnish marble, at a specified price for each cubic foot, payable in instalments, and of a specified description, sufficient to supply the defendants' marble mill for a time agreed upon, and the plaintiff quarried a small quantity of marble, which the defendants accepted and used, and it appeared that the contract had not been performed on the part of the plaintiff, but that both parties understood they were acting under the contract, so far as they went, it was held, that the plaintiff could not sustain an action on book account against the defendants, to recover for his labor and expenses, or for the marble delivered to the defendants, but that his only remedy was by action of covenant upon the contract.

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And it was held, that the rights of the plaintiff, in this respect, were not varied by the fact, that the defendants, after the undertaking began to look discouraging, encouraged the plaintiff to proceed, and expressed their confidence in his ultimate success.

And even if the parties had abandoned all expectation that the marble finished would be accounted for at the rate fixed in the contract, and treated it as a distinct matter, still, as it resulted from an attempt on the part of the plaintiff to perform the contract, the defendants, by accepting it, would not preclude themselves from showing, in defence, that they had in fact received less than enough to compensate them for what damages they had sustained by reason of the failure of the plaintiff to perform his contract.

And it makes no difference, in such case, that the contract was entered into by the parties rashly, or that it has proved disastrous in its result, or that both parties were mistaken in their estimate of the expense necessary to carry the contract into effect on the part of the plaintiff, or that it has proved extremely difficult, without great and disproportionate expense, to carry the contract into effect, according to its terms.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and auditors were appointed, who reported, in substance, as follows.

The claim presented by the plaintiff was for labor performed and expenses incurred by him under a contract in writing, under seal, entered into by the parties, April 10, 1841, by which the plaintiff agreed to open a marble quarry, belonging to the defendants, and to deliver marble, in blocks of a specified size and quality, at the mill of the defendants,—the defendants having the right, however, to retain all the marble quarried by the plaintiff, though in blocks of less than the specified size, unless the plaintiff should elect to keep such blocks; which right was given him. The plaintiff was to receive payment, in instalments, for the marble delivered at the mill, at a specified rate for each cubic foot; and he agreed to commence the work immediately, and to prosecute the same with reasonable diligence through the quarrying season, and to do the best he could to supply the mill with blocks immediately, and to keep the mill supplied from and after the first of June, 1841.

The contract was not performed by the plaintiff according to its terms, and no marble answering its terms was delivered, except a small block of twenty feet. A quantity of other marble was quarried

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and drawn to the mill, and some of it was sawed by the defendants; but it was not otherwise proved, that it was accepted on the contract. Sufficient marble, of the description mentioned in the contract, could not have been obtained from the quarry, to fulfil the contract, by any reasonable amount of labor during that season. It appeared, that after the work had been commenced, and while it was progressing, the defendants, in conversation with the plaintiff, used expressions of confidence in the prospects of success, which tended to encourage the plaintiff to go on with his contract. The marble, so far as it was worked, was filled with natural seams; so that few, and those small, blocks of sound marble were to be obtained; and those were injured by the use of powder,—which was injudicious and imprudent, if it was intended to preserve them for use.

After the execution of the contract the plaintiff commenced working at the quarry and continued to work until the close of the quarrying season; and his labor and other expenses were estimated by the auditors at \$825,00, towards which the defendants had paid him \$61,96,—leaving a balance in plaintiff's favor of \$763,04, if he was entitled to recover therefor. The auditors also found, that the marble remaining in the quarry was considerably injured by the injudicious use of powder; but that the labor of the plaintiff in opening the quarry was worth to the defendants, above the damage done by the mode of quarrying, \$100, and that the marble sawed and used by the defendants was worth \$100, leaving a balance in favor of the plaintiff, if he was entitled to recover for what his labor was worth to the defendants, of \$138,04. But the auditors also found, that if the contract between the parties had been performed according to its terms, it would have been productive of profit to the defendants, which they failed to receive, of at least \$200,00.

The auditors also reported, that the defendant Phelps, on the 14th day of September, 1841, and while the work was in progress, sold his interest in the quarry to the defendant Slason, and ceased, from that time, to have any interest in the contract with the plaintiff, and notice thereof was given to the plaintiff; and that the balance in favor of the plaintiff at that time, if he were to be allowed for what his services were worth to the defendants, was \$74,87,—unless the loss to the defendants from the plaintiff's failure to fulfil the contract

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should be offset ; in which case there would be nothing due to the plaintiff.

The county court, December Term, 1845,—BENNETT, J., presiding,—rendered judgment in favor of the plaintiff for \$74,87. Exceptions by both parties.

C. Linsley for defendants.

1. The action on book account will not lie, because all the plaintiffs' claim grows out of a written contract, not executed. The auditors have endeavored to estimate what advantage the defendants may have derived by opening the quarry, and they find how much the plaintiff has expended ; but, on examining the contract, we find that the defendants contracted to pay for nothing of this kind. *Austin v. Wheeler*, 16 Vt. 95. *Faxon et al. v. Mansfield et al.*, 2 Mass. 147. *Stark v. Parker*, 2 Pick. 267. 8 Vt. 54. 12 Johns. 165. 13 Johns. 94. 14 Ib. 326.

2. There can be no recovery for the value of the stone sawed ; for there is no evidence that they were accepted on the contract ;—but if they had been, there could be no recovery ; for the auditors find, that the damages sustained by the defendants, by reason of the non-fulfilment of the contract, exceed the value of this marble.

3. It is no excuse for the non-performance of the contract, that the marble could not be obtained without great expense. That, by the contract, was to be at the risk of the plaintiff. Chit. on Cont. 272. *Hadley v. Clark*, 8 T. R. 259, 267. *Bullock v. Dommitt*, 6 T. R. 650. *Barker v. Hodgson*, 3 M. & S. 267. *Baylies v. Fettysplace*, 7 Mass. 325. *Harrington v. Dennie*, 13 Mass. 93. *Towteng v. Hubbard*, 3 B. & P. 300. *Alleyn* 27.

4. The defendants cannot be made liable for the advantage resulting to them from the opening of the quarry. That was a necessary result of the completion of the contract, but no separate ground of compensation.

E. D. Barber and *E. J. Phelps* for plaintiff.

1. When labor has been performed and expenses incurred by the plaintiff under a special contract, but not in conformity thereto, but from which the defendant has derived a benefit, the plaintiff may re-

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cover such remuneration from the defendant, as the benefit conferred upon him is reasonably worth; Chit. on Cont. 451 & notes; *Farnsworth v. Garrard*, 1 Camp. 38; *Robson v. Godfrey et al.*, 3 E. C. L. 85; *Denev v. Daverell*, 3 Camp. 451; *Dyer v. Jones*, 8 Vt. 205; *Gilman et al. v. Hall*, 11 Vt. 510; *Austin v. Wheeler*, 16 Vt. 95; *Blood v. Enos*, 12 Vt. 625; *REDFIELD*, J., in *Booth v. Tyson*, 15 Vt. 515; and especially, if the defendant accepts the work and retains it. And if he knew, that the plaintiff was not performing the work according to the contract, and did not dissent, his assent will be presumed; *Hayward v. Leonard*, 7 Pick. 181; *Smith v. Lowell*, 8 Pick. 178; *Lanningdale v. Livingston*, 10 Johns. 36; *Jewell v. Schrooppel*, 4 Cow. 564; *Landue v. Seymour et al.*, 24 Wend. 60; *Wadleigh v. Sutton*, 6 N. H. 15; *McIntire v. Morris*, 14 Wend. 90; *Somerset v. Dighton*, 12 Mass. 386; *Britton v. Turner*, 6 N. H. 481; *Austin v. Wheeler*, above cited. The facts found by the auditors bring this case clearly within the rule of law for which we contend, and entitle the plaintiff to recover.

2. The plaintiff is entitled to recover in this form of action. *Dyer v. Jones*, 8 Vt. 205. *Wilkins v. Stevens*, 8 Vt. 214. *Weller v. McCarty*, 16 Vt. 98. *Austin v. Wheeler*, Ib. 95. *Gilman et al. v. Hall*, 11 Vt. 510. *Fry v. Slyfield*, 3 Vt. 246.

3. We contend, that the plaintiff is entitled to recover the full value of his labor and expenditures. The parties entered into the contract evidently upon the supposition that the quarry could be opened, and marble obtained of the quality described in the contract, by a reasonable amount of labor and expenditures during that season. This proved impracticable. The defendants knew the manner in which the plaintiff was performing the labor, and encouraged him to proceed. By this they waived any objection to the manner of quarrying, or the quality of the stone quarried. The plaintiff, then, stands in the position of having performed the labor and incurred the expenses at the request of the defendants, and for their benefit. The contract was entered into under a *mistake of fact*, which renders it inoperative. *Broom's Legal Maxims* 95.

4. But even if the plaintiff cannot recover, except by force of the special contract, he is entitled to recover for the marble sawed and used by the defendants. The sawing and using it was a waiver of

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all objection on their part. *Way v. Wakefield*, 7 Vt. 223. *Austin v. Wheeler*, above cited.

The opinion of the court was delivered by

REDFIELD, J. There can be little doubt, perhaps, at this day, that, when a party performs labor under a special contract, but not in such a manner, or at such a time, as to entitle him to recover under the contract, he may nevertheless recover, in general assumpsit so much, only, as the labor is worth to the defendant. And I should not now be inclined to question, that this may be done, even when the contract is, as in the present case, under seal. I should be inclined to admit, too, that the recovery, in such case, might be had in the action on book account.

But when the party acquiesces, at the time, in the manner of performing the work, he is precluded from afterwards objecting on that account. And here, the defendants having received the marble and used it, it will be presumed they expected to account for it under the contract. The auditors, too, expressly find, that "the claim of the plaintiff is for labor performed and expenses incurred under the written contract;"—"The contract was not performed according to its terms, and no marble answering the terms was delivered, except a small block of twenty feet." It will be impossible, under this state of facts, to say that the parties did not understand, that they were acting under the contract. The contract itself, too, seems to contemplate, that the defendants may, if they choose, receive all the marble which the plaintiff shall raise; and if they do, they are to pay for it under the contract. There is no proof in the case, and no ground for believing, that the defendants have received any marble, which they did not expect to account for under the contract, and which the plaintiff did not expect they would so account for. And the plaintiff having a remedy by action of covenant upon the contract, we do not think he can waive that and bring assumpsit, or book account. If the contract had not been under seal, and had been so far performed as to give a claim for payment for any of the marble in entirety, the action of general assumpsit would lie. While but a part of the price is due, the action, even in case of a contract not under seal, must be upon the contract, probably; but when the

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party has a remedy by contract under seal, he is precluded from suing in assumpsit, or any other inferior action.

And from the terms of this contract, we are not inclined to question the plaintiff's right to sue for the instalments of the price of the marble delivered, as it is delivered and becomes due; but that suit must be upon the contract.

The argument for a kind of implied parol contract, running parallel with this written contract under seal, in consequence of the defendants having encouraged the plaintiff to continue his exertions after the undertaking began to look discouraging, is certainly not justified by the finding of the auditors. Such expressions from the defendants, so far from dispensing with the contract, would naturally be understood merely as an encouragement to prosecute it, and were doubtless so received. To understand them in any other sense would be unreasonable.

But if we could find from this case, that the parties wholly abandoned any expectation that the marble finished would be accounted for at the rate fixed in the contract, and treated it as a distinct matter, still, as it resulted from an attempt on the part of the plaintiff to perform the contract, the defendants, by accepting it, do not preclude themselves from showing, in defence, that they have in fact received less than enough to compensate them for what damages they have sustained by reason of the failure of the plaintiff to perform his contract; and in that view the plaintiff would not be entitled to recover any thing, unless the *attempt* to fulfil this contract was all, which the parties contemplated the plaintiff would do. This brings us to the question of the proper construction of the contract.

It was doubtless a very rash contract at the time it was entered into, and subsequent events have shown it to have been very disastrous; but this is no sufficient reason, why the plaintiff should not be bound by it. It would always be the desire of the court to relieve parties from unforeseen and unexpected disasters; but that cannot always be done. And in such a rash and experimenting period as the present, the most we can expect to do is to guard against positive fraud and overreaching. To attempt more than this would be idle.

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We have no doubt, that both parties contemplated a more successful result from the present experiment. It is certain the plaintiff did, or he would not have bound himself positively to furnish enough marble out of that quarry to supply the defendants' mill after the first of June, 1841. Before that he is to do the best he can to supply the mill; but from that time he "engages to keep the mill supplied." Nothing could be more positive. There is no pretence of fraud on the part of the defendants. Both were mistaken as to the expense necessary to perform the contract on the part of the plaintiff; but that affords no possible ground of defence at law. It is possible a court of equity, in an extreme case, might relieve the party on such grounds; but in a court of law we cannot defend against such a contract, without showing an absolute, physical impossibility. The difficulty of performance, however great, is no excuse in a court of law. The plaintiff must abide the consequences of his contract. And for the failure on his part the defendants are entitled to such damages as they have sustained,—which the auditors report exceeds the amount of benefit to the defendants.

The claim of the plaintiff, to recover his account as charged, can only be sustained upon the ground that this contract was wholly abandoned and some other substituted,—which is not shown.

So that, upon the facts found, it seems there is no ground of ultimate recovery, upon an adjustment of all the equities,—and especially is there no ground of recovery, in this form of action, upon a sealed instrument, which is specific in its provisions, and where all that has been done by the plaintiff has been done professedly under the contract, and he has not so far performed the contract, as to benefit the defendants to an amount equal to the damage they have sustained by reason of his failure to perform the contract.

Judgment reversed, and judgment for defendants.

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TREASURER OF VERMONT v. ISAIAH CLARK.

In construing statutes the terms of a proviso may be limited by the general scope of the enacting clause, to avoid repugnancy.

The proviso to the statute of Oct. 30, 1844, giving the county court jurisdiction in cases of theft and receiving stolen goods, where the value of the property does not exceed seven dollars, is to be construed as giving jurisdiction of such cases to justices of the peace, if proceedings shall first be commenced before them.

DEBT upon a recognizance, entered into by the defendant before a justice of the peace, conditioned that one Aaron Southard make his personal appearance before the county court in Addison county, at the December Term, 1844, to answer to a charge of larceny. It was agreed, that Southard was brought before the magistrate, upon a grand juror's complaint that he had stolen property above the value of seven dollars; that the magistrate, having examined the proofs and ascertained the value of the property to be above seven dollars, ordered Southard to find surety for his appearance before the county court; that thereupon the recognizance in question was entered into by the defendant; that an indictment was found against Southard by the grand jury; and that the recognizance became forfeited by the default of Southard to appear in court.

The county court,—BENNETT, J., presiding,—upon these facts, decided, *pro forma*, that this action could not be sustained, and rendered judgment for the defendant. Exceptions by plaintiff.

G. W. Grandy, state's attorney.

Linsley & Beckwith and *P. C. Tucker* for defendant.

The opinion of the court was delivered by

REFIELD, J. The only question in this case is in regard to the construction of the proviso to the statute of Oct. 30, 1844, giving the county court concurrent jurisdiction with justices of the peace in cases of theft, or receiving stolen property, where the value of the property "does not exceed seven dollars." If we understand the proviso *literally*, it will take away from justices of the peace *all* power to

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bind over for trial any person brought before them, accused of either of the foregoing offences, let the value of the property be what it may. And as they cannot try such offences, where the value of the property exceeds seven dollars, in all such cases they must of course set the offenders at liberty. If such was the intention of the legislature, they certainly did intend to confer peculiar exemptions upon this class of offenders; for justices are required to bind over, for trial, all other offenders. The supposition, then, of its literal application is too absurd to be seriously entertained. We must, then, either declare the proviso void for uncertainty, as having no intelligible meaning, which is not too absurd to be entertained; or else we must find from the language used, with reasonable certainty, what was intended.

1. If we adopt the former alternative, which is often done in regard to deeds and other contracts, and statutes also, when their meaning is so ambiguously expressed as to rest merely in conjecture, we shall then leave the law, in this respect, as it stood before; which will make the recognizance, taken in this case, valid, and entitle the plaintiff to judgment.

2. But we prefer giving this portion of the statute a sensible meaning, if it will fairly bear such a construction. And we think it will. In order to do this, we have only to limit the extent of the signification of the terms used in the proviso by the general scope of the enacting clause. This is no more than courts always must do in regard to contracts, and statutes, to prevent sometimes running into absurdity by the literal application of general terms. Very few subjects are discussed, by the plainest writers, where this is not necessary.

The object of the statute was to create a *new jurisdiction* in the county court, that is, over the offences of theft and receiving stolen goods, where the value of the property did not exceed seven dollars. But lest it might be supposed that the *new jurisdiction* was intended to take away the majority of cases of this class from justices of the peace, it was provided, that *they* should not bind over any such offenders which might be brought before them, but should proceed to try them, thus leaving the jurisdiction of each particular case to that court, where proceedings should first be instituted, and thus remedying an inconvenience, which had been experienced in the county

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court, where persons confessedly guilty were of necessity acquitted, where the value of the property fell below seven dollars,

But in expressing this the legislature say, *in terms*, that justices shall not bind over any person, "whose case comes within the purview of said sections six and seven." By this we are referred to the enacting clause for sections "six and seven." There we find the new jurisdiction defined, with reference to these sections. And the only inquiry is, whether we shall understand the proviso as extending to these sections, as they *originally* stood, or as *qualified* by this new statute. It is the natural office of a proviso to qualify what goes before, and of which it forms a part,—not to introduce new provisions. If such a new and independent provision, as that justices should not bind over *in any case of theft*, were intended to be introduced, it certainly would have constituted a new section, and not a mere proviso, or limitation, to a section, which, in its widest range, did not extend nearly so far, as it is now claimed the proviso is to be extended by a literal adherence to the words of the statute.

We think, therefore, upon the facts agreed in this case, and upon which the case has been submitted to this court, the plaintiff is entitled to judgment.

Judgment of county court reversed and judgment for plaintiff for the penalty of the bond.

The defendant interposed his motion to chancery, and the case was continued for the hearing of that motion.



ERWIN BARKER v. JOHN ESTY AND WILLIAM ESTY, and AUGUSTUS GRAVES, Trustee.

The statutes of this State, relating to trustee process, do not extend to any other class of debts, or demands, than such as are the ordinary result of contract, either express or implied, creating a fiduciary relation.

Under the Revised Statutes of this state one cannot be held as trustee for money received by him from the principal debtor as usurious interest. It

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is not a "credit intrusted" to the lender by the borrower, within the meaning of the statute ; but the remedy for money so paid is rather a statutory redress for a virtual wrong, and, as such, a part of the administration of the corrective police of the country.

If a trustee has been held chargeable in the court below, and this court find the judgment erroneous, as the law *then* stood, the liability of the trustee may be examined, as affected by any change in the law subsequent to the hearing in the court below.

The intention of the legislature in enacting a statute can only be determined by the fair and natural import of its terms, with reference to the subject matter, and without reference to any traditional history of the occasion of its enactment, unless that result from some known state of embarrassment under the former law.

In the construction of a statute a conjunctive clause may be taken in a disjunctive sense, when it is obvious that such was the intention of the legislature.

The statute of Nov. 5, 1845, extending section four of chapter twenty nine of the Revised Statutes to whatever a trustee holds "against law and equity," cannot be so construed, as to render a person chargeable as trustee for money received by him from the principal debtor as usurious interest. The true construction of that statute is, that it so extends the construction of the section named, as to render a person chargeable, as trustee, for whatever, of the nature specified in that section, belonging to the principal debtor, he holds against law, or equity.

TRUSTEE PROCESS. The trustee filed a general disclosure in the county court, December Term, 1844, denying that he had any credits or effects in his hands, belonging to the principal debtors. The plaintiff then filed interrogatories, inquiring of the trustee whether he had not received from the principal debtors money, as interest above the rate of six *siz per cent. per annum* on money loaned ;—which interrogatories the trustee declined to answer, unless required so to do by the court. The county court,—BENNETT, J., presiding,—decided *pro forma* that he must make answer ; and thereupon the trustee admitted, that he had received from the principal debtors money, as interest above *six per cent. per annum* on money loaned, to an amount sufficient to pay the debt and costs in this case, besides his costs as trustee ; and the county court, upon this admission, decided *pro forma* that he was chargeable as trustee, under the statute. Exceptions by trustee.

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E. D. Barber for trustee.

I. The trustee should not have been required to answer the interrogatories put to him :—

1. Because no man is bound to admit that he has violated the law. *Boardman v. Roe*, 13 Mass. 104. *Cush. Tr. Proc.* 95, § 228. 15 Mass. 127. 9 Pick. 145.

2. Because this is an adversary proceeding as to him ; and he is not bound to disclose the facts under which he received the money, and thereby furnish evidence to sustain the claim.

II. The trustee cannot be held chargeable ; because it does not appear that he has any *goods, effects, or credits*, belonging to the principal debtors, *intrusted, or deposited*, in his hands, or possession. The terms "goods," "effects," have the same legal signification, and mean *moveables*, as distinguished from real estate. The term "credits" means indebtedness, a debt, in its ordinary signification, as importing something due upon a contact. It does not mean a mere right of action, to which the principal debtor may or may not resort, at his election. *Fitch v. Waite*, 5 Conn. 117. *Hoyt v. Swift et al.*, 13 Vt. 129.

The statute against usury is made for the benefit of a particular class of persons, the borrowers, to protect them from the extortion and oppression of the lender. *Doug.* 670. 7 Conn. 409. *Cowp.* 792. 9 Mass. 48. The money paid as extra interest passes, therefore, to the lender, by virtue of a contract which is good against all the world, except the borrower ; and it is the property of the lender, unless the borrower chooses to rescind the contract and reclaim the money. No other person can disaffirm it for him, so as to make the lender liable to refund. 15 Mass. 515. 13 Mass. 104. 8 Paige 639. 10 Ib. 583. *Cush. Tr. Proc.* 36, 37. 5 Conn. 117.

III. The statute having provided a particular remedy in such case, no other remedy can be pursued.

IV. The enactment of the statute of Nov. 5, 1846, cannot affect this case.

1. Because the case must be tried, in this court, by the law as it stood when the case was tried in the court below. This court is to decide, whether there was error in the decision of the county court, *at the time it was made*.

2. This statute does not vary the liability of the trustee. It does

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not alter the Revised Statutes; and it cannot be gathered, from the statute itself, that it was intended to have that effect.

Briggs and Prout for plaintiff.

1. The statute in reference to interest, if it has any bearing as determining the relative condition of the parties to a usurious bargain, makes the usurer a simple contract debtor; and such being his condition as to the principal defendants, the case should be sustained upon those general principles, upon which the remedy is founded. Rev. St. 366, § 4.

2. This case is within the usual test, determining whether one is trustee, or not, independent of any legislative provision modifying the rule, and which is according to the case of *Whitney v. Monroe*, 19 Maine 42,—that is, “whether the principal defendant has, or has not, a right of action against the supposed trustee.” The same test, essentially, has been recognized by this court, in *Sargeant v. Leland*, 2 Vt. 280. *Hutchins v. Hawley et al.*, 9 Vt. 295. *Hoyt v. Swift*, 13 Vt. 129. *Hurlburt v. Hicks*, 17 Vt. 193.

3. But if these cases do not furnish a rule sufficiently broad to embrace the case at bar, then we contend that the statute of Nov. 5, 1845, determining the construction of the fourth section of the trustee statute, is amply sufficient. Acts of 1845, pp. 18, 19.

4. The trustee is bound to disclose, although he may be compelled to testify to facts, that have a tendency to subject him to pecuniary loss. *Ward v. Sharp et al.*, 15 Vt. 115. *Devoll v. Brownell*, 5 Pick. 448.

But it is said, that creditors have no right, under the statute, to recover the amount paid as usurious interest, as the statute gives that right only to the person making the payment. This is applying a rule of strict and literal construction. The statute is remedial, and, upon all rule, should be so construed as to extend, instead of restricting, the remedy given for those supposed evils, against which it is directed.

But the case of *Boardman v. Roe et al.*, 13 Mass. 104, is cited, to show that the creditors of a party cannot come in and compel him to disaffirm his own bargain against his consent. That case was decided upon the Massachusetts statute of 1784, which provided, that, if a greater rate of interest than six per cent. should be taken, the

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person *offending* should *forfeit* the full value of the money and goods so lent, to be recovered by *qui tam* action, or by *indictment*. Under such a law the usurer could not be regarded as a *contract debtor* of the borrower, when he was liable to be informed against by any person, who should discover his *offence*. But usurious contracts are void as to the *excess* of interest paid, because the statute *prohibits* taking more than six *per cent*. Consequently the law requires no act of disaffirmance on the part of either party. *Nelson v. Denison*, 17 Vt. 73.

The opinion of the court was delivered by

REDFIELD, J. The first question to be determined in this case is, whether, under the Revised Statutes, the trustee can be held liable. That will depend upon the extension we give to the terms of the statute,—“Every person, having any goods, effects, or credits, of the principal defendant *intrusted* or deposited in his hands, or possession, or which shall come into his hands, or possession, after the service of the writ and before disclosure made, may be summoned as trustee.”

It is obvious, that the terms used in this statute have no natural fitness to express a claim of the character named in this disclosure. It has often been held, in these cases, that the person summoned cannot be adjudged trustee, unless there exists a cause of action against him in favor of the principal debtor;—certainly in general he is not liable under the term “*credits*,” unless such cause of action exists. But it by no means follows, that he is liable as trustee in every case, where the principal debtor might maintain an action *ex contractu* against him. For the statute only makes him liable upon “*credits*,”—and “*credits intrusted*.” This surely does not include every cause of action *ex contractu*. It would hardly be contended, I think, that money obtained from one by force, or fraud, or which was due in debt upon a penal statute, or which resulted from the sale of chattels taken by force and sold for money, could be esteemed “*credits intrusted*,” within the fair construction of this statute;—yet in all these cases an action of *assumpsit*, or debt, might be maintained,—and for *money*.

This statute has, in fact, long since received a practical and judicial construction, by common consent, in this State, and in many of

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the other American States, and in England, where it exists in certain districts; and it has never been considered, that it extended to any other class of debts, or demands, than such as are the ordinary result of contract, either express, or implied, creating a fiduciary relation. It is the *fidei commissarius* of the civil law and the *factor* of the common law. In what sense, then, is the man, who, by taking advantage of another's necessities, has extorted money from him, to be esteemed literally and strictly his factor, trustee, or confidential depositary, or commissary?

Usury paid, under the existing statute of this State, is, by express enactment, liable to be recovered back "*by the person paying the same,*" in an action of assumpsit, declaring for money had and received, or goods, &c. This is the only penalty imposed upon the lender, the only redress given to any one. Can this, then, be fairly said to be a "credit intrusted" with the lender by the borrower? It seems to me such a construction would be forced and unnatural. If the borrower is viewed as the "oppressed party," "the slave of the lender," as he is denominated in the books, it is money *extorted* from him, and is no more a "credit intrusted" with the lender, than if it were taken by robbery, by trespass, by fraud, by gambling, or was deposited with a stake holder on a wager upon an election, or paid for illegal fees, or to obtain a bankrupt certificate,—in all which cases the money might be recovered back in an action of assumpsit; but no case can be found, I trust, where any such remedy as this has been given. But the recovery, in this form, of usurious interest paid has been denied in the case of *Boardman v. Roe*, 13 Mass. 104. And a recovery of goods, delivered for usurious interest, was denied in an action on book account in this state, on the ground that the statute having provided a remedy, it must be followed. *Allen v. Thrall*, 10 Vt. 255.

And we consider this remedy, given by our statute, as was held in that case, as the only remedy which exists in any such case. It is not a "credit," but a matter of punishment, so to speak, upon the lender, for a wrong inflicted, and of redress to the borrower, for an injury sustained,—a part of the corrective police of the country, having its foundation in a *supposed tort*, rather than any *trust*, or *credit*. If it were not viewed in this light, it would be treated as a gift, and no remedy would be afforded, more than for any other vol-

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untary payment ; but it is upon the very ground, that the party paying is supposed to be under a kind of constraint, not to act freely, to be subject to a virtual duress of circumstances, so that the maxim *volenti non fit injuria* does not apply, that any remedy whatever is given. For a court, then, to say that money, paid under these circumstances, is a "credit intrusted" with the lender, and that he holds the money, in that way, in trust for the borrower, or his creditors, involves too gross an absurdity to be seriously entertained ;—and we do not understand, that the plaintiff's counsel expect to succeed in the suit upon this ground mainly.

It is not necessary to inquire, in this case, how far a remedy, for recovering usury paid, existed at common law. If one did exist,—which I should not be inclined to question here,—it was upon the ground, that the money was obtained by wrong, and was allowed upon the general principle, that all money so obtained may be recovered back in an action of assumpsit, and will not help this case. And we do not think it important to inquire here, whether this remedy for the usury paid is strictly personal, and can be enforced only by the party, in his lifetime. Actions have sometimes been sustained by the personal representative. But that will not affect the case. Nor do we esteem it important, whether the statute allows the party to recover only the *excess* of interest paid, or *all* the interest paid, or twice or ten times the interest or excess of interest paid, or the full amount of the money loaned,—as in the Massachusetts statute of 1784 ; it is none the less, in all these cases, a statutory redress for a virtual wrong, and, as such, a part of the administration of the corrective police of the country and more connected with the *criminal* than the *civil* administration of justice. It in no sense differs from the case of money lost at play, except that then the limitation of the action is one month, and in the present case there is no special limitation.

But, secondly, it becomes necessary to inquire how far this case is affected by the statute of November 5, 1845.

It might be a sufficient answer to this point in the case to say, that a court of error is only to determine whether error intervened *at the time of rendering judgment* ;—to do which we are to look at the matter as the law *then* stood. This would have been conclusive in the case, had the judgment below been in favor of the trustee.

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We could not then have reversed that judgment, upon the ground of any *alteration* in the law since the rendition of the judgment. But here we *must* reverse the judgment, on the ground that it was erroneous, as the law then stood. We are, then, to render a proper judgment in the case. The whole case is before this court; and we have power, undoubtedly, to allow a repleader, as is often done in this court, or to remand the case for a more full hearing upon the facts, which, indeed, is seldom done, but would, no doubt, be done, upon its being shown that the trustee had received funds since his disclosure was filed. This has been done in other States, where the law is similar to what it is here in that respect. And if the trustee can be charged on the ground of an alteration in the facts, we do not see why he may not be charged on the ground of an alteration in the law, making him chargeable for what he was not before, with the same property.

What, then, shall be the effect of this statute, in regard to the liability of the lender to be charged as the trustee of the borrower for the excess of interest paid? There can be no doubt of the power of the legislature to make him thus chargeable. And when it is said, that this law was passed explicitly for this purpose, it is certainly not a little remarkable, that, if this were so, the legislature should have chosen to express themselves thus ambiguously. It is, indeed, not uncommon to express an unpleasant or an offensive truth, or one which is indecent, by a circumlocution, or a metonymy, or some other figure of speech. But that a legislature, in enacting a law *for a specific object*, should choose to express a natural, common matter under the shadow of an unmeaning abstraction is certainly not easily accounted for. This mode of expression is sometimes necessary, indeed, when one wishes to include many particulars, whether known, or unknown, under a general provision; but that one should choose *general words* to express a *particular idea* is certainly past my comprehension. And to my mind it is doing violence to the common sense of the legislature, to say that this statute was enacted *expressly* for such cases as the present.

We can only judge of the import and intention of a statute *by its terms*. Any other rule would lead us into endless and fruitless conjecture and hopeless uncertainty. This statute must be judged of, as are all other statutes, by the fair and natural import of its terms,

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with reference to the subject matter, and without reference to any traditional history of the occasion of its enactment, unless that result from some known state of embarrassment under the former law.

What, then, does this statute profess to do? Not to add any new provision to the trustee statute, but to fix the construction of one of its sections, and that the one which we have already transcribed into this opinion. It provides, that *that section* "shall be so construed, as to extend to and embrace whatever any trustee may have in his hands, or possession, *which he holds against law and equity.*"

It is obvious, that this statute must be taken in a sense *somewhat* more restricted than its terms *literally* import. If every person sued as trustee were to be held liable for *all* that he holds *against law and equity*, it would lead to a somewhat extended examination, in most cases, and to a degree of agrarianism, which no other act of the legislature, so far as I know, would lead us to suppose they could have intended.

Nor will it be contended seriously, I think, that this statute can fairly be so construed, as "to embrace whatever any trustee may have [of the principal debtor's] which he holds against law and equity." If this were so, it must include lands, as well as chattels, —and not only chattels which were deposited with the trustee, but also chattels and money, which the trustee had taken from the principal debtor *by force, or by stealth, or robbery.* It would also extend to *all penalties*, which had accrued to the principal debtor, and, for aught I know, to all claims for damages, whether for breaches of contract, or for torts, not excepting cases of personal assault and of slander. We should be sorry to give to any statute, upon this subject, such an extension, unless from the most obvious necessity, resulting from its terms and fair import.

Viewed in this light, it does not seem to me that there is any difficulty, or that there ever need have been any difficulty, in determining the fair construction of this statute. It does not profess to add any new provision to the trustee statute, but only to fix the *construction* of the section first quoted. That section will then stand the same, as if this construction had been incorporated into it. It will then read, "Every person, having any goods, effects, or credits" &c. "*in, trusted or deposited in his hands,*" &c., "*and which he holds against law and equity,*" may be summoned as trustee. The statute of

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1845 is not, that the trustee shall be *liable* for "whatever he holds against law, or equity;" but that the fourth section of chapter twenty nine of the Revised Statutes shall extend to "whatever he holds against law and equity." That must, of course, mean, "whatever [of the things named in that section] he holds against law and equity."

The only objection, which can be urged to this construction of the statute, it seems to me, is, that it does not affect the former statute, or, if it does, that it *restrains* its operation. If either of these results followed from the construction here adopted, it would not be at all conclusive against its fairness, but might, I admit, raise doubts in regard to it. The maxim, that a statute, or a contract, should be so construed *ut res magis valeat, quam pereat*, is but one of the acknowledged rules of construction, and these are all but modes proposed of approximating the truth; and if all these rules of construction cannot prevail, we must choose those, which, all things considered, seem to make most for good sense and *probable truth*. But it is only by reading "*law and equity*," in the conjunctive, instead of the disjunctive, that this construction either *restrains* the operation of the former statute, or that it does not *extend* it.

But it is not uncommon, in the construction of a statute, to take a conjunctive clause in a disjunctive sense, when it is obvious such was the intention of the legislature. Such, no doubt, was the intention here. It will then include goods, effects, or credits, &c., which the trustee holds against *law or equity*,—whereas before, the section had, by judicial construction, been limited to cases where the principal debtor had a *legal* remedy. *Hoyt v. Swift*, 13 Vt. 129.

Whether the statute should be construed to extend to all cases, where the trustee might be made chargeable for goods, effects, or credits, *in equity*, it is not necessary here to determine. It is certain, that it will and must have the effect to remove a defence, which was very common in these cases before, viz., that the trustee was only liable in equity. But it is certain this statute will not extend that section, so as to embrace what is neither goods, effects, or credits; and we have already shown, we think, that the claim made in this case is for neither goods, effects, or credits. And it seems to us, that, aside from the *private history* of this statute, no one would have given to it any more extended operation, than the one here given it. If the legislature desire to pass a law, making persons

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liable as trustees in cases like the present, it is a very easy matter to do so. But if they are too delicate, or too timid, to do it *in so many words*, or, for any other reason, do not choose to do it, we do not choose to do it for them. We choose to have a *law* upon this subject, and then we will enforce it, *if we can*. But it is enough *for us*, to enforce such laws as *are* made to our hands, without usurping the proper functions of the legislature.

Judgment reversed, and judgment that the trustee is not liable.



**ORLANDO FISH v. SAMUEL F. FIELD, and DANIEL NICHOLS,
Trustee.**

Whether a transfer of property from the principal debtor to the trustee was fraudulent, to defeat the rights of creditors, is a matter of fact, which should be found by the county court.

Where it appeared from the disclosure of the trustee, that the property of the principal debtor had been attached on a debt for \$1000, and that thereupon the principal debtor agreed with the trustee, that, if he would pay that debt, he would execute to the trustee a note for \$1200, payable on demand, and would confess judgment thereon and allow him to levy and collect the same forthwith, and it appeared that this was done and the trustee collected the whole amount of the \$1200 note, it was held, that he was not chargeable, under the statute, as the trustee of the principal debtor, for the \$200 received by him above the sum paid out.

Where papers, referred to in the bill of exceptions, and which were placed on file at the time the case was made up, have been destroyed, without the fault of the party, previous to the hearing in this court, he will not be allowed to supply the defect by means of *ex parte* affidavits, which had not been filed in the case. But it would seem, that affidavits would be received for this purpose, if taken with notice, or placed on file in season to allow the opposite party to file counter evidence.

TRUSTEE PROCESS. It appeared, that the principal debtor, having been sued by the Bank of Orwell upon a debt for one thousand dollars, applied to the trustee to raise for him that sum, and agreed to

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give him a *bonus* of two hundred dollars for so doing. The money was raised by the trustee and the thousand dollar debt paid therewith; and thereupon the principal debtor executed to the trustee his note for twelve hundred dollars, payable on demand, and on the same day a suit was commenced against the principal debtor upon this note, and his property was attached. The principal debtor confessed judgment in this suit,—it being part of the original agreement that he should do so,—and the trustee took out execution and collected the whole amount of the note and cost.

The county court, December Term, 1845,—BENNETT, J., presiding,—held, that the trustee was not chargeable. Exceptions by plaintiff.

E. D. & F. E. Woodbridge, for plaintiff, contended, that the trustee had in his hands \$200, of the money of the principal debtor, to which he was neither legally nor equitably entitled; that this was usury,—to which point they cited *Floyer v. Edwards*, 1 Cowp. 112; and that the judgment by confession was no bar to its being held in this suit,—to which they cited 2 Stark. Ev. 585; Rev. St. c. 29, §§ 4, 34; c. 95, p. 432; Acts of 1845, pp. 18, 19; Ord on Usury 94—96; *Jackson v. Moseley*, cited in Ib. 95; *Bush v. Gower*, 2 Str. 1043; 1 Atk. 340; *Matthews v. Lewis*, 1 Anstr. 7; *Huntington v. Bishop*, 5 Vt. 186; and *Lazell v. Miller*, 15 Mass. 207.

P. C. Tucker, for trustee, claimed; 1, That the receiving the \$200 was not usury,—to which he cited Ord on Usury 1; Rev. St. 366, § 3;—and 2, That, if it were usury, the judgment in favor of the trustee against the principal debtor was a bar to its recovery in this action,—to which point he cited Ord on Usury 93—96; *Middleton v. Hall*, Cro. Eliz. 588; *Bush et al. v. Gower*, 2 Str. 1043; *Matthews v. Lewis*, 1 Anstr. 7; *Green v. Kemp*, 13 Mass. 515, 520; *Stewart v. Downer*, 8 Vt. 320.

The opinion of the court was delivered by

REDFIELD, J. This case is, in principle, so nearly the same with that of *Barker v. Esty et al. & Tr.*, just decided, [*ante* p. 131,] that little need be said in regard to it. If it were a mere fraudulent transfer, to defeat the creditors of Field, we should, of course, hold

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the trustee liable. But if that were so, it is matter of fact, which should be found by the county court. But the testimony does not, in our opinion, tend to prove any such secret trust, or confidence, between the parties. It seems to have been a case of outrageous oppression, a kind of duress of circumstances, but in no sense a "credit," or *confidence*, between the parties. Very likely the principal debtor might recover the money back in assumpsit; but we do not think he is, in any sense, the *creditor* of Nichols, any more than if Nichols had practiced a fraud upon him in the sale of a horse, or in the performance of any duty, as a professional man, or mechanic, or common carrier,—in all which cases assumpsit will lie for neglect, or want of skill; but that is no relation of *debtor and creditor*.

This is not strictly a case of usury; for there was no *rate per cent.*, for the reason, that there was no *forsbearance*. It was literally the paying a premium upon *insurance of one's credit*,—which is not uncommon.

We have not found it necessary to examine the question, how far the confession of judgment, being a part of the original contract, would affect any remedy, which the injured party might otherwise have. It is certain, I think, that it ought not thus to be put in the power of usurers to circumvent the statute. In the English practice a warrant of attorney to confess judgment, given to cover a usurious contract, is not considered of any force to prevent the remedy. Such a device certainly ought not to be regarded as in any sense the act of the court, but of the party. And still, a judgment by confession being a formal judgment, there may be some technical difficulty in the way of redress,—but not insurmountable, I think. But this point has not been examined by the court.

Judgment affirmed.

NOTE. Upon the hearing of this case, one of the papers referred to could not be found on file; and the party relying upon it offered to show, that it was on file, when the case was made up and came into this court, but that, since that time, it had been destroyed by fire in the burning of the office of Mr. Tucker, one of the counsel. It was now proposed, to supply the defect in the case by *ex parte* affidavits, which had not been filed in the case.

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BY THE COURT. We incline to the opinion, that the party must have some way of supplying this defect in his case, which seems to have occurred without any special fault of his, perhaps; but it would certainly be a dangerous precedent, to allow it to be done in the manner now proposed. Such affidavits have never been received on the trial of any question going to the merits of the case; and they certainly could not be, upon the most liberal terms of practice, unless filed in time to allow the opposite party to file counter evidence. And in that case they should, in strictness, probably, be taken upon notice to the opposite party, as in other matters of an adversary character tried in this court.

This court have often held, that, when the excepting party makes *private papers* a part of his case, he should attach a copy of all such papers to his case; and that, unless this is done, he must see that the copy is furnished, before he can be heard in support of his exceptions. The views of the court upon this subject are fully explained in *Frost v. Bates*, 16 Vt. 145.

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GUSTAVUS PERKINS v. HENRY W. WALKER.

Where a matter in controversy in a suit has been adjudicated in a former suit between the same parties, parol evidence is admissible to show the *identity*, and then the record of the former recovery, if there have been no opportunity to plead it in the pending suit as an *estoppel*, may be given in evidence, and, as such, will be *conclusive*.

This was an action for slanderous words spoken by the defendant, charging the plaintiff with having stolen certain cloth. The defendant, in pursuance of notice under the general issue, gave evidence tending to prove the truth of the words spoken by him. The plaintiff then gave in evidence a copy of the record of a judgment in his favor in an action of trover, brought by the defendant against him to recover for the alleged taking and conversion of certain cloth; and it was admitted, that the cloth sued for in that action was the same cloth, and all the cloth, in reference to which the

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words charged as slanderous were spoken by the defendant. And it was held, that the record in the action of trover was conclusive upon the defendant, both as to the title to the cloth, and as to the defence attempted to be set up by him in justification in this suit.

TRESPASS ON THE CASE for slanderous words. In the first and second counts the slanderous words declared upon purported to charge the plaintiff with having stolen cloth. In the third count the slanderous words purported to charge the plaintiff with having stolen cloth, in the possession of the defendant, belonging to one Atwood. And in the fourth and fifth counts the slanderous words purported to charge the plaintiff with having stolen cloth, in the possession of the defendant, belonging to one Jenny. Plea, the general issue, with notice that the defendant would give in evidence, in justification, the truth of the words spoken, and trial by jury, December Term, 1845,—BENNETT, J., presiding.

On trial the plaintiff gave evidence tending to prove the speaking, by the defendant, of the words charged, and the defendant gave evidence tending to prove that the words spoken were true. The plaintiff then gave in evidence the record of a suit in favor of the defendant against the plaintiff, by which it appeared, that the defendant commenced his action of trover against the plaintiff in this suit for the recovery of the value of a roll of cloth,—in which suit there was a verdict and judgment in favor of the plaintiff in this action at the December Term of the county court, 1841; and it was admitted, that the roll of cloth in dispute in that action was the same roll of cloth, and all the cloth, to which the defendant alluded in speaking the words charged in the plaintiff's declaration, and that the point litigated on the trial of the action of trover was, whether the defendant in that action had taken and carried away the roll of cloth sued for, belonging to the plaintiff in that action.

Upon these facts the court decided, that the record in the action of trover was not only conclusive evidence as to the title of the cloth, as between the parties, but was conclusive upon the defendant in regard to the facts set forth in his notice of justification and estopped him from making the defence set forth therein.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

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Briggs and **Prout** for defendant.

1. We admit, as a general rule, that the adjudication of a court of competent jurisdiction upon a particular matter is, as a plea, a bar, or, as evidence, conclusive, between the same parties, as respects the points determined. But to entitle the record in this instance to such an effect, the *identity* of the fact in dispute must appear, and the adjudication had must have been *direct* upon the point raised in the notice of justification. 1 Stark. 201. 1 Salk. 290. 3 Chit. Pl. 928, note *a*. 1 Phil. 321. 3 East 365. 8 Conn. 418. Determining the question with reference to the declaration, the notice and bill of exceptions, these essentials by no means appear.

Again, the point involved in the action of trover related to a mere question of title to the cloth in dispute; 1 Sw. Dig. 583; 2 Phil. 220; *Philips v. Robinson*, 4 Bing. 106; *Hansen v. Meyer*, 6 East 614; 15 Petersd. 130; the plaintiff, to entitle himself to recover, was bound to show, that the cloth *belonged to him*; 2 Phil. 220. This being the issue, the defendant in that action was at liberty to show, in defence, that he had the title to the cloth, or that it belonged to other persons; 2 Phil. 229; *Laclough v. Towle*, 3 Esp. R. 114; *Philips v. Robinson*, 4 Bing. 109; *Nathan v. Buckland*, 2 J. B. Moore 153. The only effect, then, that should be given to the record, upon principle, is, that it is conclusive only of the title to the cloth *as between the parties*. Now what was the slander charged? That the plaintiff had stolen Atwood's cloth and Jenny's cloth. These were the words spoken; and how the record put into the case could operate to conclude the defendant from claiming that the cloth referred to was the property of those persons and that the defendant stole it, we are unable to perceive.

2. Another rule in regard to this subject is, that the record of a judgment shall not be used as conclusive evidence against a party, when, had the adjudication been the other way, it would not have been evidence for him to the same extent;—that is, the benefit to be derived from the judgment must be *mutual*; 1 Stark. 195-6; B. N. P. 232-3; 4 M. & S. 479; 1 Tr. 86; 3 Greenl. R. 165. Supposing there had been a recovery by the plaintiff in the action of trover, would the record have been conclusive of the defendant's guilt, in reference to the charge of which the plaintiff complains? Clearly, it could have no such effect. Again, the record introduced

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in evidence being in an action of a different nature from the present, it was conclusive of nothing that did not appear from the face of it. But the effect the court gave it concluded the defendant of his justification of the words set forth in the third, fourth and fifth counts of the plaintiff's declaration. If the slander charged in those counts is true, and which the defendant justified, it furnishes the very reason why the suit in trover was determined as it was; and that is, that the cloth belonged to other persons besides the defendant.

Linsley and Beckwith for plaintiff.

1. The points litigated on the trial of the action of trover and the facts attempted to be proved in justification in the action of slander were precisely the same. That a judgment between the same parties, upon the same subject matter, is conclusive as to the private rights of the parties is settled law. *Betts v. Starr*, 5 Conn. 550. *Denison v. Hyde*, 6 Ib. 508. *Crandall v. Gallup*, 12 Ib. 365. *Hopkins v. Lee*, 6 Wheat. 409. *Adams v. Barnes*, 17 Mass. 365. *Gardner v. Bucklee*, 3 Cow. 120. 1 Stark. Ev. 207. *Wood v. Jackson*, 8 Wend. 9. *Rice v. King*, 7 Johns. 20. *Wright v. Butler*, 6 Wend. 284. *Lawrence v. Hunt*, 10 Ib. 84.

2. If the defence had assumed the form of a special plea, and the plaintiff had replied the judgment, it would have operated as an estoppel; and when matter of estoppel cannot be pleaded, it may be given in evidence and have the effect of an estoppel. *Isaacs v. Clark*, 12 Vt. 602. *Ward v. Jackson*, 8 Wend 9. 3 Cow. 207.

The opinion of the court was delivered by

BENNETT, J. There is but a single question in this case, and that is one of very considerable importance. The inquiry is, was the county court correct, in instructing the jury, that the record given in evidence, in connection with the facts admitted on trial, was conclusive as to the title of the cloth, and also upon the defendant, in regard to the defence assumed under his notice?

The case shows, that the speaking of the words, which is attempted to be justified, was of and concerning the stealing of the same identical cloth, which was sued for in the action of trover, and that the point litigated on that trial was, whether the defendant had taken and carried away the same cloth.

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The authorities are very full, that the judgment of a court of competent jurisdiction, directly on the point, is, *as a plea, conclusive* between the same parties on the same matter directly in question in another action. It operates and is pleaded as an estoppel. It is claimed by the defendant, that, where it is not pleaded, but used simply *as evidence*, it cannot have a *conclusive* effect. It is to be remarked, that the plaintiff could not, in this case, avail himself of the judgment by plea. The defendant having gone into his defence of justification under a notice, the plaintiff could only meet it by evidence. We are not called upon to determine, what should be the effect of a judgment, where there has been an opportunity of pleading it, but the party omits to plead it, and elects simply to use it as evidence. In such a case it might be said, the estoppel was *waived*. See *Treviran v. Lawrence*, 1 Salk. 976. *Outram v. Morewood*, 3 East 365. *Vooght v. Winch*, 2 B. & A. 662. *Stafford v. Clark*, 2 Bing. 381. *Wilson v. Butler*, 4 Bing. N. C. 756. *Isaacs v. Clark*, 12 Vt. 692.

I am aware, that there seems to be some discrepancy of opinion in regard to the manner, in which an estoppel shall be made *available* in a case, in which it exists. It has been said, that, to render a verdict conclusive by way of an estoppel, it must be pleaded as such ; and that it must appear upon the record, that the *same* point was directly in issue in the first suit. This may be true, in order that the record may of itself constitute an estoppel. If this does not so appear, it must be averred and proved *aliunde* the record ; and the truth of the averment must be open to the finding of the jury.

In the *Duchess of Kingston's Case*, the principle contained in the opinion of Ch. J. DE GRAY is, that a judgment on the same matter is, in pleading, *a bar, in evidence, conclusive*. In *Aslin v. Parkin*, 2 Burr. 665, the judgment in the action of ejectment is expressly stated to be conclusive against the tenant in the subsequent action for *mesne profits*. In *Rex v. St. Pancras*, Peake 219, it was held, that a record of conviction against a parish, for not repairing a road, was *conclusive* evidence against them, as to their liability to repair. So in *Strutt v. Bovingdon et al.*, 5 Esp. R. 56. Lord Ellenborough said, that, though a record of a former cause could not, in that case, be a legal *estoppel*, so as to conclude the rights of the parties by its production, yet, he says, he should think himself bound to tell the jury to consider it *as conclusive*.

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When the question determined by a former jury has come before them as one point among many, raised on the general issue, or upon a general plea in bar, putting in issue a number of facts, it cannot appear from the record what precise point had been determined in the former proceeding. In such a case *parol* evidence is necessary, to show the point passed upon. The *parol* evidence does not, in such case, impeach the record, but is consistent with it. Though you cannot add to, or contradict, a record by *parol* evidence, yet you may explain it. In *Gardner v. Buckbee*, 3 Cow. 120, two notes had been given upon the sale of a vessel; and one of the notes had been prosecuted; and in that action the general issue had been pleaded by the defendant, with notice of a total failure of consideration, by reason of fraud in the sale of the vessel; and upon that ground the defendant succeeded in his defence. In a suit upon the second note, the defendant offered in evidence the record in the former suit; and the court held, that that record, with proof *aliunde* that fraud in the transaction was the ground upon which the verdict was founded, was conclusive against the plaintiff. *Burt v. Sternburgh*, 4 Cow. 559, adopts the same principle. See also *Wood v. Jackson*, 8 Wend. 91, in which the case of *Gardner v. Buckbee* received the unanimous approbation of the court of errors,—that court reversing the decision of the supreme court in 3 Wendell. In the case of *Young v. Rummell*, 2 Hill 478, the court have gone the length of not requiring an *estoppel* to be pleaded, in order to give it a conclusive effect in any case, in which special pleading is not necessary. The English doctrine I conceive to be, that the defendant, by pleading the general issue, waives the *estoppel*, if he might plead it. Such was also the doctrine of the supreme court in New York, in *Fowler v. Hait*, 10 Johns. 111, and in *Coles v. Carter*, 6 Cow. 691.

Unless *parol* evidence is admissible, for the purpose of connecting the *general estoppel* of a judgment with the *particular* points litigated at the trial, and upon which the verdict of the jury proceeded, the rule, which provides that the same matter shall not be twice drawn into controversy, must lose much of its practical and salutary effect.

Since the enactment of the statute in Massachusetts, abolishing special pleading, it has been held, that a verdict on the same point,

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or judgment for the same cause of action, is *conclusive*, as evidence to the jury; since it cannot be taken advantage of in any other way. *Sprague v. Wait*, 19 Pick. 457.

I am aware, that the idea has been countenanced by adjudged cases, that, to constitute a former verdict an *estoppel*, an issue must have been taken, upon the face of the pleadings, upon the *precise point*, which is drawn in question in the second suit; and that it must be pleaded in such suit by way of an estoppel. This may be necessary to constitute a *technical estoppel*. If the pleadings do not show the *precise point* litigated in the former proceedings, the identity of the point in dispute in the two actions must be made out by *parol* evidence; and whether made out, or not, is a question for the jury, under proper instructions from the court. Where the *identity* is fully made out, to hold that the proceedings in the first suit are not *conclusive*, as evidence, upon the right, is to render that axiom of the law, "*Nemo debet bis vexari pro eadem causa*," in a great measure of little practical value.

I do not conceive, that the decision we are now making is at variance with *Vooght v. Winch*, or with *Doe v. Huddart*, 2 C. M. & R. 316, which followed the case of *Vooght v. Winch*, and in which the court of exchequer held, that a judgment in the action of ejectment was not conclusive in the action for *mesne profits*. In both of those cases the court merely decide, that the party, by not pleading the estoppel when he might have done it, *waived it*. In the case of *Vooght v. Winch* it will be found, that each of the judges expressly relied upon this circumstance; and in the case of *Doe v. Huddart* the record in the ejectment might have been replied, by way of an estoppel, to the plea in the action for *mesne profits*. It is true, that, previous to the rules adopted in England in 1834, the plea of *not guilty*, in an action of trespass, put in issue the title, as well as the taking of the *mesne profits*; and it being uncertain whether the defendant intended to deny the plaintiff's title, on which he was alone concluded in the action of ejectment, or to deny merely the taking of the profits, the *estoppel* could not be replied. But under the *new rules* of pleading, the general issue being narrowed, it might be pleaded as an estoppel.

If we understand the meaning of Ch. J. De GREY, when he says, in the *Duchess of Kingston's Case*, that a judgment on the same

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point, between the same parties, is, in pleading, a bar, *in evidence, conclusive*, to be, that it is *conclusive* as a plea, where there is *an opportunity of pleading it*, and that, where there is no such opportunity, then it is *conclusive as evidence*, the seeming inconsistency in the cases would, in a great measure, be obviated; in as much as the case of *Vooght v. Winch* and other cases proceed upon the express ground, that the defendant might have pleaded the *estoppel*. This was the doctrine of the court in the case of *Trevivan v. Lawrence*, Salk. 276; and it was followed and fully approved of by the court of common pleas in *Magrath v. Hardy*, 4 Bing. N. C. 782,—where it was held, that the *estoppel* was waived, the defendant having omitted to plead it, as he might have done.

It being admitted, on the trial in the county court, that the slanderous words, which were attempted to be justified, were spoken of and concerning the stealing of the same identical cloth sued for in the action of trover, and that the point litigated and settled was, whether the defendant in that action had taken and carried away the same cloth, there was nothing in this respect to go to the jury; and the court, with these facts conceded, were right in holding the record in the action of trover *conclusive*.

It need hardly be remarked, that the decision of this court is fully in accordance with the views expressed by the learned judge in giving the opinion of the court in *Gray v. Pingry*, 17 Vt. 424.

The result is, the judgment of the county court is affirmed.



WILLIAM P. HOOKER v. ADNAH SMITH, BENJAMIN B. BROWN,
GEORGE W. CHURCH, HENRY SEYMOUR AND PAUL A. REED.

A defective conclusion of a replication can only be reached by special demurrer.

Where a declaration contains several counts, the court, on demurrer to the replication, will only notice defects in those counts to which the replication applies.

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When the original act of an officer, in the execution of civil process, is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command.

In this case a sheriff arrested a debtor on execution, by breaking open the outer door of the defendant's dwelling house; and it was held, that those who aided the sheriff in so doing were trespassers, though they acted by his command.

TRESPASS. In the second and third counts in the declaration the plaintiff alleged, that the defendants made an assault upon him and took him from his dwelling house, and kept him imprisoned, without reasonable cause, in the common jail in the county of Addison for a long space of time.

To these counts the defendants pleaded, in substance, that the defendant Smith, at the time of the committing of the supposed trespasses, was sheriff of the county of Addison and had in his hands a writ of execution in favor of one Goodrich, describing it, by which he was duly commanded to arrest and commit to prison the body of the plaintiff; that Smith, as sheriff, commanded the other defendants to assist him in executing said writ; and that the defendants, by virtue of said writ, arrested the body of the plaintiff and took him from his dwelling house and committed him to the common jail in said county;—which the defendants averred were the same trespasses charged in the second and third counts in the plaintiff's declaration.

To this the plaintiff, protesting that the writ of execution mentioned in the plea was not made out and issued as therein alleged, replied, that, at the time of the committing of the alleged trespasses, the plaintiff was possessed of a dwelling house, in Middlebury, in which he then lived, with his family, and in which he then was, and that the defendant Smith, having the said writ of execution in his possession, and the other defendants, acting under his command and directions, entered the said dwelling house by forcibly breaking open the outer door of the same, which was then closed and secured, without the leave or license of the plaintiff and against his will, for the purpose and with the intent to execute the said writ of execution within the said dwelling house by arresting the body of the plaintiff, and that, having broken and entered the said dwelling

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house, with the intent aforesaid, they, of their own wrong, seized and assaulted the plaintiff and took him from his dwelling house and committed him to the jail in the county of Addison, as alleged in the declaration; and the replication concluded with a prayer for judgment, and for the damages, by the plaintiff sustained by reason of the committing the trespasses in the *second* count in his declaration mentioned, to be adjudged to him;—but in all other respects the replication referred to the second and third counts.

To this replication the defendant demurred; and the county court,—BENNETT, J., presiding,—adjudged the replication sufficient. Exceptions by defendant.

E. J. Phelps and *E. N. Briggs* for defendant.

1. The assistants of the defendant Smith, the sheriff, acting under his command, may justify under his authority, although he exceeded his authority when they did not participate in his unlawful act. *Ham. N. P.* 64.

2. The replication is bad, as it answers a plea applying to the second and third counts in the declaration, but prays judgment only of the second count.

3. The declaration is bad, the value of the property destroyed being alleged to be \$25,00. *Clark v. Stoughton et al.*, 18 Vt. 50. This allegation is material; *Gould's Pl.* 187.

E. D. Barber and *C. Linsley* for plaintiff.

1. Under the circumstances of this case the arrest and imprisonment of the plaintiff were illegal, and all the proceedings of the officer were void. *Ilsey v. Nichols*, 12 Pick. 270. *State v. Hooker*, 17 Vt. 658.

2. The assistants can stand upon no better ground than the sheriff. No person is required by law to do an illegal act, although commanded so to do by a public officer; and he is as much bound to know the law in that, as in any other case. The sheriff can impart no higher power, than he has himself. 1 Vt. 81. 6 Mod. 140. *Oystead v. Shed et al.*, 12 Mass. 506. *Elder v. Morrison*, 10 Wend. 125.

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The opinion of the court was delivered by HALL, J. It is objected in behalf of the defendants, that the replication prays judgment upon the second count, only, of the declaration, whereas the plea, to which it applies, is an answer to both the second and third counts; and that the replication is therefore bad. This defect is found in the replication; but the replication in every other respect covers both counts; and it is laid down in 1 Chit. Pl. 643, that a defective conclusion of a replication can only be reached by special demurrer. This is believed to be the acknowledged rule; and as the demurrer in this case is general, the objection is deemed not to be well taken.

An objection was also made in the argument to a supposed defect in the declaration; but as that defect is found to exist only in the first count, to which the pleadings now before the court do not apply, it is unnecessary to notice it farther.

The principal question in the case arises upon the legal effect of the facts set forth in the pleadings. It has been held by this court, in the case of *State v. Hooker*, 17 Vt. 658, upon an indictment founded on the same transaction detailed in the pleadings, that the breaking open of the door of the dwelling house by the sheriff, to serve the process, was not only illegal, but that, after the breaking into the house, the defendant in the execution was justified in forcibly resisting the officer in executing the process. It is conceded in the argument, that the sheriff himself could not justify under the pleadings in the case; but it is insisted, that his assistants stand in a different position, that they were obliged by law, when called upon by the sheriff to give him their aid, and that, having acted by his command, they are justified, though he might not be.

It is doubtless true, that a sheriff may be held guilty of a trespass, while those who were acting by his command might be thereby excused. If the act itself be in the first instance lawful, but becomes a trespass *ab initio* by some subsequent misconduct of the sheriff, as for not returning the writ, it would be obviously unjust to hold the assistants liable for such constructive trespass. And there are probably other cases, where the command of the sheriff would be a defence to those aiding him, though the sheriff himself might not be justified. The sheriff, for the suppression of riots and the preservation of the peace, and for apprehending a person for violating the

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peace, or for any other criminal matter, or cause, is specially empowered by statute to require suitable aid and assistance. Rev. St., c. 11, §§ 10, 11; c. 98, §§ 2-9. These statutes seem to be only in affirmance of the common law, by which the sheriff might raise the *posse comitatus*, or, in other words, such a number of the men of the county as were necessary for his assistance in the execution of the King's writs, quelling of riots, apprehending traitors, robbers, &c.; Bac. Ab., Sheriff N 2.

It is said by a very accurate elementary writer, that, in the arrest of a party for crime, those who obey the sheriff's command will be thereby justified, though the sheriff himself might be acting without authority. Ham. N. P. 63-65. If those who are called to his aid are bound to obey, without inquiring into the sheriff's authority, such doctrine would seem reasonable; and perhaps the same rule would apply here, where the case arises under the provisions of the statute which have been mentioned.

The statute of this state also contains a provision applicable to the service of *civil* process. Where great opposition is made to the service of any lawful writ, or precept, the sheriff is authorized, *by and with the advice of two justices of the peace*, to raise all or any part of the militia of the county to aid and assist him; and in such case the officers and soldiers of the militia are made liable to a fine, for neglecting to obey the call of the sheriff. Rev. St., c. 11, §§ 12-14. It would seem to be a harsh proceeding, to hold that the soldiers, in such case, should be made liable as principals in a trespass, if the doings of the sheriff should be held unlawful. Probably the command of the sheriff would be their sufficient justification.

These are believed to be all the statutory provisions applicable to persons acting in aid of a sheriff; and it is observable, that none of them reach the case of these defendants. The sheriff, in this case, was not acting in his character of general conservator of the peace, or in the arrest of a party for crime, where special authority is given him to command assistance,—nor were the defendants aiding him as a part of the militia of the county; but they were merely called individually to his aid, in the service of a writ of execution,—a civil process. It appears, also, that the defendants knew, at the time, that the sheriff was acting under a *civil* process. In their plea in bar they describe it particularly, and say that the sheriff requested

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them to assist him in executing it ; and in the replication, the truth of which is admitted by the demurser, it is stated, that the defendants entered the plaintiff's dwelling house, by forcibly breaking open the outer door, *for the purpose and with the intent* to execute therein the writ of execution by arresting his body. With the full knowledge that the sheriff was about to do an illegal act, they united with him in committing it ; and we think they must share with him in its consequences. A contrary doctrine would enable a sheriff, under color of a civil process, to add to his own physical power, to accomplish an illegal object, the power of a lawless, but wholly irresponsible, mob.

The doctrine now held, that, where the original act of the officer in the service of civil process is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command, is fully sustained by the cases of *Oystead v. Shed*, 12 Mass. 511, and *Elder v. Morrison*, 10 Wend. 128, which were cited in the argument.

The judgment of the county court is therefore affirmed.

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WILLIAM Y. RIPLEY v. HARVEY YALE.

[Same Case, 18 Vt. 220.]

Whether one, who receives the possession of land from another, is estopped from claiming title to it must depend upon the inquiry, whether the claim attempted to be set up is consistent with the contract under which the possession was taken.

Where one enters into possession of land under a parol contract of purchase, and pays a portion of the purchase money in advance, and is, by the terms of the contract, to receive a deed of the premises upon furnishing certain required security for the remainder of the purchase money, and the security is offered, but the vendor refuses to deed, there is nothing in the nature

*And see *Ripley v. Yale et al.*, 16 Vt. 257.

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of the contract, which would preclude the purchaser from claiming to hold the premises adverse to the vendor; and such possession, if open and exclusive, accompanied by claim of title, will avoid a deed of the premises, executed by the vendor to a third person subsequent to the performance of the contract on the part of the purchaser.

And even if the purchaser could be considered as tenant at will to the vendor until the completion of the contract, yet if he offer to perform the contract on his part, and the vendor refuse to deed, and the purchaser thereupon give notice to the vendor that he shall "*hold on to the land*," the possession of the purchaser becomes adverse and will avoid a deed subsequently executed by the vendor to a third person.

EJECTMENT for land in Middlebury. Plea, the general issue, and trial by jury, June Term, 1846,—BENNETT, J., presiding.

On trial the plaintiff gave in evidence a deed of the premises from Russel Bly to himself, dated August 11, 1841. It appeared that Bly, on the eighth day of February, 1839, made a parol agreement with the defendant for the sale of the premises, estimated at about thirty acres; and the defendant was to take them at the estimate, or have them measured, at his election; and when he had made his election, and had furnished security for the payment of the balance of the purchase money, remaining unpaid, he was to receive from Bly a conveyance of the land by two deeds, one to the defendant and the other to his brother, conveying the land in such proportions as the defendant might direct; that the defendant paid to Bly one hundred dollars in advance, towards the purchase of the land, and then, by the consent and direction of Bly, entered into possession of the premises as his own; that afterwards, and previous to the execution of the deed from Bly to the plaintiff, the defendant elected to take the land at the estimate, without measurement, and tendered to Bly adequate security for the payment of the balance of the purchase money, and requested Bly to execute deeds according to the terms of the agreement; that Bly declined to do so, but executed and tendered to the defendant one deed of the entire premises, conveying them to the defendant,—which deed the defendant refused to accept; and that the defendant then said to Bly, "that he should hold on upon the land."

It appeared, that the defendant had been in the exclusive possession of the premises from February, 1839, to the time of trial, cut-

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ting wood and timber thereon from year to year, clearing some part, mowing the grass, and selling timber from the premises, claiming to be the owner thereof; and that it was generally known, that the defendant was in possession of the premises. It also appeared, that the plaintiff, immediately after he received his deed from Bly, gave notice of this to the defendant, and demanded the surrender of the possession ; and that the defendant declined so to do, claiming the land as his own, and denying the right of Bly to convey it to the plaintiff.

The court having intimated, that, in their opinion, the foregoing facts constituted in law an adverse possession, in the defendant, of the premises, at the time of the execution of the deed from Bly to the plaintiff, so as to avoid that deed, the plaintiff became nonsuit, with leave to move for a rule to set aside the nonsuit.

The plaintiff having moved for a rule to set aside the nonsuit, the motion was overruled and judgment entered for the defendant. Exceptions by plaintiff.

Briggs & Williams and P. Starr for plaintiff.

The defendant was a tenant at will to Bly, at the time Bly conveyed to the plaintiff. Rev. St. 314, § 21. In *Greene v. Munson et al.*, 9 Vt. 37, it was held, that a tenant cannot dispute the title of his landlord ; and this doctrine is extended to one who enters into possession of land under a contract of purchase. *Bowker v. Walker*, 1 Vt. 19. *Jackson et al. v. Bard*, 4 Johns. 230. *Tuttle v. Reynolds*, 1 Vt. 80. *Hodson v. Sharp*, 10 East 352. Instruments which do not purport to convey, as leases, contracts, &c., cannot be the foundation of an adverse possession. Adams on Eject. 57, 468. 2 Phil. Ev. 201. *Norris v. Smith*, 7 Cow. 717. *Low et al. v. Reynolds*, 1 Caine 444. To determine whether a possession is adverse, it is only necessary to inquire whether it can be the constructive possession of the legal proprietor. If the adverse possessor claims the title of the true owner as his own and founds his possession upon it, his possession will not be deemed adverse to the owner. Adams on Eject. 48, 470. *Sinsabaugh et al. v. Sears*, 10 Johns. 435. *Jackson v. Stephens*, 16 Johns. 116. *Carson et al. v. Cains et al.*, 20 Johns. 301. The defendant claims under the parol contract with Bly, admits Bly's title, and that he holds under

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it; consequently he cannot hold adversely to Bly, who is the plaintiff's grantor. 5 Cow. 92. *Knox v. Hooker*, 12 Mass. 327. *Williams v. Watkins*, 3 Pet. 47. *Ripley v. Yale*, 18 Vt. 220.

C. Linsley and **E. D. Barber** for defendant.

One who enters into possession of land as a purchaser can in no sense be considered as entering under him of whom he purchases. Neither the vendor nor the purchaser so understood it. It cannot vary the case, whether there has been a conveyance, or whether the conveyance is defective. The purchaser, having paid the purchase money and taken possession, has acquired a right capable of being enforced; the property is equitably his, and he can enforce the perfection of the legal evidence of title. He does, it is true, at the moment of purchase, acknowledge the title of him of whom he purchases; but he enters into possession, because, by the purchase, the property purchased has become his. He has taken the property purchased, but has not all the evidence required by law to show his purchase; but his acts upon the land purchased are precisely such as they would be, if his paper title were perfect. Such a possession is adverse. Whoever occupies land, taking all the profits to his own use, and lays out money in improvements, making no acknowledgment of a superior, must be considered as holding in his own right and adversely to all others. *Hall v. Dewey*, 10 Vt. 593. *Fisher v. Prosper*, Cowp. 208. *Robinson v. Douglass*, 2 Aik. 367. *French v. Pierce*, 8 Conn. 443, 446. *Mitchell v. Walker*, 2 Aik. 266.

The opinion of the court was delivered by

HALL, J. The statute, under which the deed from Bly to the plaintiff is sought to be avoided, is founded on the equitable consideration, to which the interest of a party in the possession of land with a claim of right is supposed to be entitled. It provides, chap. 60, sec. 26, that a deed shall be absolutely void and of no effect to convey lands, "if, at the time of the delivery thereof, such lands shall be in the *actual possession* of a person, claiming the same by possession, or *in any other way*, adverse to the grantor." There can be no doubt, that the language of this statute embraces every case of the adverse possession of land under a *claim of title*, without regard

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to the character of the possession in other respects, and without reference to the validity or invalidity of the title. The naked possession, under a claim of right, is assumed to furnish sufficient *prima facie* evidence of title, to justify the legislature in extending their protection to the possessor against the claims of any other person, than him whose right may have been invaded. It enacts, in substance, that no adventurer in land titles shall come into a court of law to disturb such possession,—that the party alone, who has been injured, shall enforce his claim of title against the possessor.

The bill of exceptions states, that Yale, the defendant, had been in the exclusive possession of the land from February, 1839, to the time of trial, cutting wood and timber thereon from year to year, clearing some part, mowing the grass, and selling timber from the premises, claiming to be the owner thereof. This would clearly seem to be a possession and claim adverse to the whole world, and, under ordinary circumstances, would be sufficient to avoid any deed of another, attempting to transfer the title.

It is, however, insisted, that the relation of the defendant to the grantor was such as to preclude him from taking advantage of this statute; and whether he stand in such relation is the principal question in the case.

There can be no doubt, but that the *claim* of the defendant was sufficiently adverse, provided he could be permitted to make it. He claimed the whole title. The case does not therefore fall within the principle of *Selleck v. Starr*, 6 Vt. 194, where it was held, that the possession and claim of a less estate under the grantor was not such an adverse claim, as rendered the deed void, the claim being subordinate to and consistent with the superior title of the grantor. Is there any rule of law, that estops the defendant, in this case, from making an adverse claim to the whole title?

There are, no doubt, certain circumstances, under which a party taking the possession of land from another would not be permitted to set up an adverse claim to it. These circumstances usually exist between landlord and tenant. The doctrine is, indeed, well established and deeply rooted, both in this state and in England, that neither a tenant, nor those claiming by him, can, in general, be allowed to dispute the title of the landlord. Upon what principle is this doctrine founded? The estoppel of the tenant by the ancient

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common law seems to have rested solely on the indenture of lease between the parties. The tenant was estopped by his deed from denying the title of his landlord; but if the lease were by deed poll of the lessor merely, the lessee might plead that the lessor had nothing in the land. Litt. Sec. 58. 1 Co Lit. 47 b.

The doctrine, now so fully admitted, that a tenant and those claiming under him are estopped, without deed, appears to be of modern origin. In *Doe v. Smythe*, 4 M. & S. 347, in 1816, DAMPIER, J., said, "It has been ruled often, that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This, I believe, has been the rule for the last twenty five years; and I remember it was so laid down by BULLER, J., on the western circuit." This comparatively modern doctrine cannot rest on the mere fact, that the tenant derived his possession from the lessor. A possession may often be adverse to him from whom it is derived. It was held in *Mitchel v. Walker*, 2 Aik. 266, that the use of water to turn a mill for fifteen years, accompanied by a claim of right, would give the defendant a title to the easement, though the right was claimed to have been derived from the plaintiff. The grantee in fee derives both his title and possession from the grantor; but his possession is nevertheless adverse. So also is the possession of one claiming under a defective deed, though the title do not pass.

In Massachusetts it is held, that an entry upon land under a parol purchase, payment having been made and the party entitled to a deed, is adverse, and that a possession under such entry, if continued twenty years, will make the possessor a good title;—and also, that the claim of one, entering on land by parol gift, may be adverse to the donor, and that such possession, continued for twenty years, bars the donor's right of entry and of action. *Barker v. Salmon*, 2 Metc. 32. *Brown v. King et al.*, 5 Metc. 173. *Sumner v. Stevens*, 6 Metc. 337. In all these cases the adverse claim is consistent with the terms, upon which the party took possession.

But the lessee of land takes the possession under an agreement, either express, or necessarily implied, that he will hold the land, during the continuance of the lease, in subordination to the right of the lessor, and that he will surrender to him the possession at the end of the term. He cannot, therefore, be allowed to controvert

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the title of the lessor, or set up against him the title of another, without violating, by a manifest breach of faith, the agreement under which the possession was committed to him. The doctrine, then, that a tenant shall not be permitted to deny his landlord's title, would seem to rest on the common principle applicable to estoppels *in pais*, that an admission of a party, upon which another has been induced to act, and by which he has acquired an advantage to himself, is of so important and solemn a character, that he shall not afterwards be allowed to controvert it,—that it shall be conclusive evidence against him. The tenant having obtained the possession of land, which he would not otherwise have had, by means of an agreement to surrender it, he shall not be permitted to hold the land in violation of that agreement. See *Blight's Lessee v. Rochester*, 7 Wheat. 535.

I can conceive of no other principle, upon which one, who receives the possession of land from another, should be estopped from claiming title to it, but upon the ground that to make such claim would be a violation of the agreement under which the possession was obtained. If this be correct, the inquiry in all such cases will be, is the claim, attempted to be set up, consistent with the contract of possession? If it be, the claim may well be made. If it be in violation of such contract, the party is estopped from making it.

In the present case the defendant went into possession under an agreement to purchase, having paid forty *per cent.* of the purchase money, and, on furnishing certain specified security for the residue, he was to have a deed of the land. The object of the contract was the passing of the whole title. The possession was taken under that expectation. If the defendant performed the contract on his part, there was no agreement, either express or implied, that he should surrender the possession. On the contrary, on such performance, he was to have a perfect title in fee;—his possession was to be perpetual. He did perform the contract on his part. He furnished the required security, but Bly refused to deed. But for this refusal, the defendant would now be the owner of the land. There can be no breach of faith in his claiming precisely what, by the terms of the contract, he was to have. There is, therefore, nothing in the relation in which the defendant stood to Bly, under the contract of purchase, performed as it was on his part, to prevent him from setting up a claim of title in himself, adverse to Bly.

Ripley v. Yale.

The claim of the defendant is not, that Bly had no title at the time of the contract, but that, by the contract, the title has passed to him. It may be true, and doubtless is, that the defendant's claim of title is so far unfounded, that it could not prevail in an action of ejectment brought by Bly against him. By the contract of purchase he admitted that Bly was the owner of the land, and would now be estopped from denying his original title. He is in the situation of one claiming under a defective deed, or by parol gift. His title is imperfect; but there is nothing in his condition to prevent him from claiming title in himself; and such claim, with the possession, if continued for fifteen years, would bar the title of the original owner.

If the defendant is to be treated as having been a tenant at will to Bly on his original entry upon the land, as is claimed on the part of the plaintiff, his tenancy must be considered as having been so far thrown off by his notice to Bly that he should hold the land, as to enable him from that time to commence a possession adverse to his landlord, upon the doctrine decided in *Hall v. Dewey*, 10 Vt. 593. This notice appears to have been given prior to Bly's deed to the plaintiff; and, upon every view of the case, we think the deed must be held void under the statute, by reason of the adverse possession of the defendant at the time of its delivery.

It may be observed, that there seems a peculiar propriety in giving effect to the statute in this case. The defendant, although he has acquired no legal title, has certainly some equitable claim upon the land,—a claim which a court of chancery might, perhaps, enforce by a decree for a specific performance of the contract. If the deed of Bly passes the title to the plaintiff, the defendant's remedy in equity is either destroyed, or greatly embarrassed; and there are therefore strong reasons, why the title to the land should be adjudicated between the parties to the original transaction, and why Bly should not be permitted to transfer his side of the controversy to another.

The decision now made does not conflict with that of the court at the former hearing of this case. 18 Vt. 220. The bill of exceptions did not then show the terms of the contract of purchase by the defendant, nor any performance of it by him. It was then treated as an unperformed executory contract. Nor was there any notice proved to Bly, of the adverse claim of the defendant. The defend-

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ant being considered as holding in subservience to Bly, it was then held, upon such view of the case, as it would be now, that his possession could not be adverse.

The result is, that the ruling of the county court, against the motion of the plaintiff to set aside the nonsuit, is affirmed.

.....

CHESTER WINSLOW AND WILLIAM A. BATES v. GORDON NEWELL.

Where the owner of land has recovered judgment in an action of ejectment against one who entered upon the land subsequent to the enactment of the Revised Statutes, the person so entering cannot recover for betterments put by him upon the land, notwithstanding he may have entered and occupied in good faith, supposing that he had a good title in fee to the land.

And *quare*, whether such person, in the absence of any law giving him a right to recover for betterments made by himself, in faith of his own entry, can recover by referring his entry to that of another person, from whom he purchased the land, and who entered previous to the enactment of the Revised Statutes.

But if he can take advantage of such former entry, he can claim nothing by it, if the person making such former entry did not suppose, at the time, that he had a good title in fee to the land.

If one take possession of land, and then abandon it, his possession cannot be tacked to that of the next possessor, either for the purpose of making title to the land by possession, or for the purpose of claiming any benefit by virtue of the statute in reference to betterments.

A., supposing he had good title to a lot of land, put B. in possession of the land, as tenant. B. subsequently surrendered his possession to A., and purchased of another person a title to the lot, which he did not at the time suppose to be good, and retained the possession until he sold the lot to C., who entered subsequent to the enactment of the Revised Statutes, supposing he had acquired a good title, and made improvements. A. did not convey his title and possession to any one, but subsequently abandoned all claim to the land. And it was held, that C., having been ejected from the land, could not recover for his betterments by virtue of the original entry made by B. in faith of A.'s title.

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THIS was a declaration for betterments,—the defendant having recovered judgment against the plaintiffs in an action of ejectment for the land described in the declaration,—and was tried at the December Term, 1845,—BENNETT, J., presiding.

On trial the plaintiffs gave in evidence a deed from one Capen, collector of a land tax, to Sturgis Penfield of one hundred and sixty acres of lot No. 48 in the second division of lands in Goshen, executed and recorded Sept. 8, 1825, and also gave evidence tending to prove, that in 1835 one Goss, in pursuance of a parol agreement between himself and Penfield, entered upon that part of the lot recovered by Newell in the action of ejectment, and repaired the fences around the clearing, being ten or twelve acres, and occupied it as a pasture during the season of 1836; that in the spring of 1837 Goss received from one Stewart a quitclaim deed of forty acres of said lot, and about the same time made a parol agreement with Penfield, to purchase of him one hundred and sixty acres of said lot,—it being called a two hundred acre lot, but measuring about two hundred and twenty five acres; that soon after this Penfield sent to Goss a deed of the one hundred and sixty acres, which Goss declined to receive on account of some of its provisions; that it was then agreed between them, that Goss should continue to occupy the land as he had done before, until some new agreement should be made between them; that Goss continued to occupy the part of the lot claimed by Newell from 1835 to 1841, repairing the fences from time to time and occupying it as a pasture; that in 1840 one Stephen Lard purchased of Penfield one hundred and sixty acres of said lot, and took a written agreement for the conveyance, no boundaries or location being fixed, but Penfield then informing Lard that fifty acres of the lot belonged to Newell; that Lard made some improvements upon the lot,—but not on the part claimed by Newell; that in 1841 Lard sold his interest in the contract to one Emerson, and Penfield executed to Emerson a bond for a deed, in the terms of the agreement with Lard, and informing Emerson that fifty acres of the lot belonged to another person; that in 1842 the plaintiffs purchased of Goss his interest in the lot, and in 1843 received a deed; that the plaintiffs also, in 1842, purchased of Emerson his interest in the lot, claiming that they owned the part of the lot before occupied by Goss, and saying that they wanted the rest of the

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lot to go with it, and received from Penfield a warrantee deed of the one hundred and sixty acres in discharge of his bond to Emerson; that in the spring of 1842 the plaintiffs entered upon the part of the lot claimed by Newell and erected a saw mill and expended several hundred dollars in making improvements; and that they were informed by Goss, before purchasing of him, that he thought his title to the lot good;—and Goss, who was a witness, testified, that he had consulted counsel, and thought he had a good title to the lot.

The defendant gave in evidence a deed to himself from one Sally Kendall of the fifty acres in question, and proved that the same was recorded in 1830, and also gave evidence tending to prove that he had executed leases of this land to different persons; that Goss, before he entered upon the lot, knew of the defendant's title; that the defendant continued all the time to assert his title; that the plaintiffs had knowledge of this title; that Penfield, Lard and Emerson recognized this title; that while Emerson was in possession under Penfield he and Newell surveyed the lines dividing the fifty acres from the rest of the lot; that in 1840 and 1841 the defendant leased the fifty acres, and they were occupied by his tenants; and that Goss relied upon the weakness of Newell's title and did not suppose that he had any legal title to the lot himself.

The court charged the jury, that, to entitle a party to recover for betterments, he must have supposed, at the time of his purchase, that he was obtaining a good title in fee; that if Goss did not himself put any betterments upon the land, then so far there must be an end to any claim for betterments by the plaintiffs; but that, if Goss did put on betterments, still the plaintiffs could not recover for them, unless Goss himself could have recovered for them, if he had been the defendant in the action of ejectment; and that, as it appeared from the plaintiffs' evidence, which was uncontradicted, that Goss went into possession in 1835 merely under a parol license from Penfield to occupy, and had never taken any title from Penfield, and had, after his refusal to accept the deed from Penfield, agreed with Penfield to occupy as he had first done until some new agreement should be made, there could be no ground for any claim for betterments put upon the land by Goss under any title derived from Penfield.

The jury were also told, that if they found that Goss was in possession of the fifty acres, or any part of it, under the title derived

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from Stewart, supposing he had a good title in fee, and that the plaintiffs purchased that title supposing they were to get a good title in fee, and entered upon the land in 1842, supposing such title good, the plaintiffs would be entitled to recover for whatever betterments Goss put upon the land, if any, notwithstanding Goss went into possession in 1835 by the license of Penfield, and notwithstanding the deed from Goss to the plaintiffs was not executed until 1843; but that, if they found that Goss acted in bad faith, and did not suppose that he had acquired any title to the fifty acres claimed by Newell, or any part of it, under the title from Stewart, then Goss himself could not have recovered, and the plaintiffs could not recover for any betterments made by Goss.

The jury were farther told, that if they found that Goss acted in good faith, supposing he had purchased of Stewart a good title in fee to the land claimed by Newell, and that the plaintiffs purchased of Goss in good faith, supposing they were acquiring a good title in fee, they would be entitled to recover for such betterments as they had themselves made, though Goss had made none himself, and though the plaintiffs had entered upon the land in the spring of 1842, and since the enactment of the Revised Statutes; but that, if Goss did not suppose he derived any good title from Stewart, then the plaintiffs could claim no benefit from his entry; and, as their entry was subsequent to the time when the Revised Statutes came into operation, they could not recover for betterments made by themselves.

The jury returned a verdict for the defendant. Exceptions by plaintiffs.

Linsley and Beckwith and A. Peck for plaintiffs.

Briggs & Williams for defendant.

The opinion of the court was delivered by

REDFIELD, J. In this case I do not understand that there is any pretence of recovering for betterments made by Goss under the Stewart title; for the jury have found that he did not *suppose that deed* gave him any title to the fifty acres, for which the defendant recovered in ejectment. There is, indeed, nothing in the case to show that Goss ever made any betterments on the lot, unless his put-

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ting up the fences and occupying the pasture is to bear that construction ;—but, allowing that he did, he could not recover for them on the ground of the Stewart title, which he did not suppose extended to this part of the lot.

It seems equally clear, that the plaintiffs cannot recover for the betterments which they have themselves made, by resting upon the entry made by Goss, when Goss himself is found to have entered not supposing that he had any title to this part of the lot. It is somewhat questionable, perhaps, whether the plaintiffs can recover for betterments made by themselves, when no law existed giving them any such right, by referring their entry to a time anterior to that when it actually occurred. But however that may be, it is certain they cannot, by virtue of the entry of Goss, place themselves in any better condition, than that in which *he was*. It would be an anomaly, to permit the plaintiffs in this case to claim betterments upon the strength of an entry in bad faith, because they purchased it in good faith and made the improvements supposing they had a good title in fee, when in fact there was no law in existence giving *them* any right to recover on the strength of their own *bona fide claim of title in fee*, and the facts would not bring them within the provisions of the statute, by tacking their betterments to the one under whom they claim. The plaintiffs ought to be content, if the court suffered them to put the case both upon their own title and that of their grantor, although in one case the *law* failed them, and in the other the *facts*.

All claim on the ground of the plaintiffs' own entry and that of Goss being disposed of, it only remains to inquire, whether the plaintiffs can so connect themselves with Penfield's entry upon this lot, as thereby to claim to recover, either for betterments made by him, or his servants, or tenants, or made by the plaintiffs in faith of his title and entry upon the lot.

There may be some confusion in the statement of the case; and possibly the court, after all, do not get a correct understanding of it. But it would seem, that, if Penfield ever authorized any entry upon the land in controversy under himself, it was not persisted in, but abandoned. For we find, that neither Penfield, Lard, nor Emerson, ever entered upon *this land*, or made any claim to it, but expressly acknowledged the claim of the defendant. The plaintiffs purchased Penfield's title upon the express ground that it was confined to the

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other part of the lot; and they have no claim of title to this portion of the lot, under Penfield.

It is well settled, that if one enter upon land and occupy, and then abandon his possession, it cannot be tacked to that of the next possessor, for the purpose of making title to the land by possession. By the abandonment the possession is gone, for all such purposes. The fifteen years' possession, necessary to give title, must be under one *connected claim* of title, although it may be by numerous persons, and may pass from one to the other by *parol merely*; still, it must be *connected*.

So, too, in these betterment cases, if one enter upon land by a tenant, or servant,—as Goss testified Penfield did, upon this land, by him,—yet if he afterwards abandon such entry, and do not convey it to any one, either by deed, or parol, it is impossible for one, who purchases the right of the tenant, who continues in possession under another title, which proves defective, to eke out his own title by a resort to this first entry, upon the ground, that, *at that time*, the landlord *supposed* he had good title to *this part* of the lot also. For in this case it appears, that Goss finally surrendered to Penfield all right of possession under him, and Penfield abandoned all claim to this portion of the lot, and Goss continued his possession under another title,—which merged whatever former right *he* had.

The difficulty in the plaintiffs' justifying their putting betterments upon this lot, under Penfield's entry by Goss, is, that they do not show that they have ever entered upon this portion of the lot *under Penfield*, or in faith of *his entry*, or of *any entry under his title*,—but the contrary.

We think, therefore, the defendant is entitled to judgment on the verdict.

Lincoln *v.* Warren.

TOWN OF LINCOLN *v.* TOWN OF WARREN.

In order to have gained a legal settlement in a town under that clause of the statute of 1817, which provided that a person should have a settlement, who should hold in the town, for two years, any one of several specified offices, it was not necessary, that the office should have been held for two years in succession.

But it was essential to the acquiring a settlement under that provision, that the person should have a continuous residence in the town from the time he held the first office until the settlement was acquired. If he held the office the two years, but with an interval between, and during that interval resided out of the town for any period, the settlement would not have been acquired.

APPEAL from an order, made by two justices of the peace, that John Butterfield, his wife and child, remove, as paupers, from Lincoln to Warren. Plea, that the paupers had not a legal settlement in Warren, and trial by jury, June Term, 1846,—BENNETT, J., presiding.

On trial it appeared, that John Butterfield with his wife and a son came to reside in Warren in 1820, and resided there until April, 1826, when he removed, with his family, to Waitsfield, and resided there until February, 1827, and then removed back to Warren and resided there until 1829; that in 1823 and 1827 he was elected to the office of lister in Warren for the years ensuing next after his election; and the plaintiffs offered parol evidence tending to prove, that he officiated as lister during these years,—it not appearing from the records of the town that he had ever been sworn;—to the evidence so offered the defendants objected, but it was admitted by the court, as tending to prove that he had been duly sworn.

Upon these facts the court directed the jury to return a verdict for the defendants. Exceptions by plaintiffs.

Linsley and *Beckwith*, for plaintiffs, insisted, that it was not essential to the acquiring a settlement in a town by holding office two years, that the office should be held for two years in succession, and that there is nothing in the statute to warrant a construction requiring that the person holding the office should be a resident of the town during all the time between the two years.

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Asakel Peck, for defendants, contended,—1, That the very words “for two years” import an entire period of time, and cited to this point *Inh. of Southborough v. Inh. of Marlboro'*, 24 Pick. 166; *Paris v. Hiram*, 12 Mass. 268;—and 2, That the pauper’s removal from town during the intermediate period rendered his holding the office the first year nugatory and inoperative to gain a settlement, and that, on his return to Warren, he commenced *de novo*, under the statute, to gain a settlement.

The opinion of the court was delivered by

BENNETT, J. It is to be taken that the pauper was appointed to and did discharge the duties of lyster, in Warren, for the years 1823 and 1827, having been duly sworn to the faithful discharge of the duties of such office. It appears, however, that, between those years, he, together with his family, removed out of that town and continued to reside in a neighbouring town for the space of about ten months.

It is claimed in argument, that the pauper, to have gained a settlement under the statute of 1817, must have been a lyster of the town in two *consecutive* years;—but we think not. The statute enacts, “That any person, who shall, in any town in this state, be for two years appointed to and sworn to the faithful discharge of the office of town clerk, or lyster, &c., or shall be appointed to and sworn to the faithful discharge of one of said offices one year, and another of said offices in *another year*, shall be adjudged to have his settlement in such town.” There are no words in the statute, which necessarily import, that the two years must be in succession. The statute uses the expression “for two years,” and not for the *term* of two years; and when it speaks of the person’s holding one of the offices in one year, it uses the expression, “and another in *another year*.”

If it had been intended, that the two years should have been in *succession*, the phraseology would probably have been, “and another the *next year*.” The fourth section of the statute, which provides for gaining a settlement by reason of the person’s having a list of a given amount for five years, requires, in express terms, that it should be five years in *succession*. So the eighth section requires a residence for the *term* of seven years. The word *term*, *ex vi termini*, imports a *succession* of years.

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The more important question relates to the effect, which shall be given to the paupers removal from Warren between the two years, for which he was lyster. We think a person's right to gain a settlement by his holding any of the offices specified in the statute is a qualified right, and that a residence in the town is a necessary ingredient to the gaining of a settlement, and that it must be *continuous*, until the settlement is complete. If the pauper removes from the town, while his right of settlement is *inchoate*, it must be an abandonment of what had been done towards gaining a settlement. A person cannot have two, or more, *inchoate* settlements at one and the same time, either of which, at his option, may be ripened into a perfect settlement.

The result is, the judgment of the county court is affirmed.

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ALLEN DUNSHEE v. HARVEY PARMELEE, Administrator of EDWARD DUNSHEE.**[IN CHANCERY.]**

Where, upon the hearing before the chancellor on a bill of foreclosure, the mortgage described in the bill was not produced by the orator, but the defendant admitted its existence and original validity, and the case proceeded as though it had been produced, the defendant was not allowed, upon the hearing on appeal in this court, to raise any objection on account of the absence of the mortgage, as a ground for reversing the decree.

Where the note secured by a mortgage is paid in part, and a new note is given for the balance, and the parties agree that the new note shall be substituted in place of the mortgage note, the mortgage will still stand as security for the payment of the latter note.

In this case the mode, adopted by the master for computing the interest upon the mortgage note, was one long in use, but was objected to, on the hearing on appeal; but the question not having been argued, the court declined to consider it.

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APPEAL from the court of chancery. This was a bill of foreclosure, in which the orator alleged, that on the fifteenth day of June, 1835, the intestate, Edward Dunshee, executed to him a promissory note for five hundred dollars, which was secured by a mortgage of certain premises; that payments were made upon this note from time to time, and subsequently a new note, dated June 15, 1838, was given for the balance remaining due upon the first note, being \$303,00; and that it was agreed between them, that the new note should be substituted for the former note, and that the mortgage should stand as security for it, until it should be paid. The administrator answered, denying all knowledge in reference to the matters alleged in the bill. The answer was traversed, and testimony was taken,—the substance of which sufficiently appears in the opinion of the court.

The court of chancery,—BENNETT, Ch.,—referred the case to a master to ascertain and report the sum due in equity; and the master made his report, computing interest upon the principal from the date of the note to the time of decree, and interest upon each year's interest on the principal from the expiration of the year to the time of decree. The defendant was ordered to pay the amount, thus ascertained, by a time specified, or be foreclosed of all equity of redemption in the premises. Appeal by defendant.

Linsley and Wicker, for orator, cited *Davis v. Maynard*, 9 Mass. 242; *Cary v. Prentiss*, 7 Mass. 63; *Dana v. Binney*, 7 Vt. 493; 15 Johns. 555, 567.

H. Needham and Asahel Peck for defendant.

The opinion of the court was delivered by

HALL, J. After the case had been opened in this court in behalf of the plaintiff and also argued by the counsel for the defendant, in regard to the effect of the testimony to connect the new note with the first note and with the mortgage, it was, in conclusion, made a ground of defence, that there was no proof of the existence of the mortgage described in the bill; and on examination of the papers no such proof was found. It was within the recollection of the chancellor who made the decree, that at the hearing below the mortgage

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was treated as being in the case, and as having been a valid mortgage to secure the old note; and such was admitted by the defendant's counsel to have been the case. He, however, insisted on his right to make the objection now, though he had neglected to make it then.

This court, in matters of chancery, sits as an appellate court, and can receive no testimony but such as comes up from the chancellor with the appeal. If we are to consider there is no such mortgage as that described in the bill, the decree of foreclosure must be reversed; for the plaintiff's claim to the decree is based on the mortgage. What is to be the effect, upon the hearing in this court, of the admission of the existence and original validity of the mortgage, on the hearing before the chancellor?

The statute, which allows appeals from the court of chancery,—Rev. St., c. 24, sec. 20,—provides, that the supreme court "shall examine all errors that shall be assigned or found" in the decree of the chancellor, and shall affirm, reverse, or alter, such decree, as justice shall require. The whole decree of the chancellor is appealed from, and all the pleadings and testimony in the case are sent up,—not, however, for the purpose of bringing the case here as an original case, but to enable this court to see if the chancellor has committed any error in making the decree. From the papers alone the decree appears to be wrong; but it having been conceded before him that the plaintiff holds the mortgage described in the bill, and that it was valid to secure the old note, it is manifest the decree was right,—unless there be error after the mortgage is allowed to form a part of the case. If the objection now taken had been made before the chancellor, the plaintiff might have had an opportunity to obviate it; and would undoubtedly have been permitted, on some terms, either to file his mortgage as evidence on the hearing, or to have the hearing postponed, to enable him to make proof of it. But this court can give him no such opportunity; and if this new objection, now for the first time made, is to be allowed, it is obvious that a final decree must be directed against the plaintiff, without our finding any error in the decree of the chancellor,—and upon a point not in controversy before him, and in all probability not at all involving the real merits of the case.

In the state of New York the court of errors has appellate jurisdiction in chancery under a statute similar to ours. It is there a

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rule, that an objection, which a party, by his silence in the court below, may be deemed to have waived, and which, when waived, would leave the merits of the cause to rest with the decree, shall not be taken in the appellate court; and that no point, or question, which, had it been raised in the court below, might have been obviated by amendment, or proof, can be raised in the court above. But the rule does not apply to objections, which neither amendment or proof could have obviated. *Palmer v. Lorillard*, 16 Johns. 348. *Beekman v. Frost*, 18 Johns. 544. *Waller v. Harris*, 20 Wend. 555. This rule of the court of errors is spoken of with approbation, and as applicable to the proceedings of this court, by Ch. Justice WILLIAMS, in *Mott v. Harington*, 15 Vt. 194; and indeed, it seems a necessary rule, as well to preserve the distinct appellate jurisdiction of this court, as to promote the fair and due administration of justice.

In the present case, the existence and original validity of the mortgage having been admitted in the court below, we think the defendant cannot now be permitted to object to its absence from the papers in the case, as a ground for reversing the decree.

Considering the mortgage as admitted, the testimony in the case appears satisfactory, to show a part payment of the original note by the intestate, the giving of the three hundred and ninety three dollar note for the balance, and the substitution of the latter note, by the agreement of the parties, for the original mortgage note. This makes the case identical with that of *Dana v. Binney*, 7 Vt. 493, where it was held, that the substitution of a new note for a portion of the mortgage debt was not such a payment of the debt, as to be a fulfilment of the condition of the mortgage.

An objection is made by the counsel for the defendant to the mode, adopted by the master, of computing the interest on the mortgage debt. The objection, though stated, was not argued; and we do not feel called upon, without arguments, to consider the question,—the rule adopted being one which is understood to have been long in use.

The result is, that no error is found in the decree of the chancellor, and that the papers are to be remitted to him, with directions to carry the decree into effect.

Gibson et al. v. Briggs et al.

J. GIBSON ET AL. v. BRIGGS & DEWEY.

[IN CHANCERY.]

Where, upon the hearing in this court of a case appealed from the court of chancery, the reading of certain testimony was objected to, for the reason that it was taken and filed after the rule for taking testimony in the case had expired, and it did not appear that it was used at the hearing before the chancellor, but it appeared that both parties filed their exhibits in the case after the taking of the testimony objected to, it was held, that the parties must be considered as having kept open, by consent, the time for taking testimony, beyond the general rule.

But as the opposite party claimed, that he had only omitted to file a motion to suppress the testimony, as incompetent, because he did not consider it in the case, the court allowed the matter to stand upon the hearing, the same as if such motion had been filed in proper time.

APPEAL from the court of chancery. Upon the hearing in this court it appeared that the testimony of one witness had been taken by the master and filed in the case six months after the rule for taking testimony in the case had expired, and after the other testimony was closed. It did not appear, that there had been any special order of the chancellor for taking this testimony, or that it had been read at the hearing in the court of chancery.

BY-THE COURT. Unless it can be shown, that this testimony was used on the hearing of the case before the chancellor, or that it was so taken that it might have been used, we do not perceive how it can be used upon the hearing here.

But it appearing, on farther reading and examination of the papers in the case, that the parties had, on both sides, filed their exhibits after the taking of the testimony objected to, THE COURT considered, that the parties must, by consent, have kept open the time for taking testimony, beyond the general rule, and suffered it to be read here. But as the opposite party claimed, that the testimony was not competent to be used in the case, and that they had omitted to file a motion to suppress it in the court of chancery, because they did not consider it in the case, THE COURT allowed the matter to stand upon the hearing the same as if such motion had been filed in proper time.

Wilson v. Rutland & Addison Fire Ins. Co.

JOHN B. WILSON v. RUTLAND & ADDISON FIRE INSURANCE CO.

Where the plaintiff recovered judgment in the court below, and the defendant has brought the case into this court by exceptions, the case will not be continued, on motion of the defendant, for the alleged reason that the debt has been attached by trustee process ;—the case should, at all events, proceed, until the rights of the parties in this suit are finally ascertained.

IN THIS CASE judgment was recovered by the plaintiff in the court below, and exceptions were taken by the defendants ; and now the defendants moved that the cause be continued for hearing at a future term, for the alleged reason, that the debt, if any was due, had been attached by trustee process, and that that suit was now pending in the county court for the county of Rutland.

THE COURT refused to continue the case, but said, that it should, at all events, proceed so far, that the rights of the parties in this suit should be finally ascertained ; that if it should appear, that the plaintiff was entitled to have this judgment affirmed, it would then be time to consider, whether any delay was necessary on account of the pendency of the other proceeding ; and that, if the creditor's debt would be seriously jeopardized by the party's being permitted to take execution here, this court, no doubt, had the power to leave the matter in such a condition, as would render the trustee process effectual.

The case was heard, and the judgment was reversed and the case remanded for another trial in the county court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF RUTLAND.
FEBRUARY TERM, 1847.

PRESENT,

Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. MILO L. BENNETT,
Hon. HILAND HALL,
Hon. CHARLES DAVIS. } ASSISTANT JUDGES.

RUFUS GRAVES AND JOHN E. STRONG v. HENRY WEEKS

The saving of the tenth section of the statute of limitations of 1797, which provides, that, when the debtor, at the time the cause of action accrued, was without this state, the suit may be commenced within six years after his return into this state, extends to a case where both parties are resident citizens of another state, and the debtor is within this state for a temporary purpose, merely, at the time the writ is served upon him.

And such action will be sustained in this state, although the cause of action may be barred, at the commencement of the suit, by the statute of limitations of the state of which both parties are resident citizens.

Presumption of payment of an account, arising from lapse of time, is matter of fact, of which advantage must be taken before the auditor.

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BOOK ACCOUNT. The action was commenced July 19, 1844. Judgment to account was rendered, and an auditor was appointed, who reported substantially as follows.

The plaintiffs presented an account against the defendant, the last item of which accrued in 1832. The defendant pleaded the statute of limitations. The plaintiffs replied, that the defendant, at the time the plaintiff's cause of action accrued, resided, and has continued to reside, without this state, and has not had known property, or estate, within this state, which could, by the common and ordinary process of law, be attached. It was agreed, that the parties have all been resident citizens of the town of Granville, in the state of New York, from the commencement of the plaintiffs' account until the time of the hearing before the orator. The defendant presented an account in offset, in reference to which some questions were raised; but as they were not passed upon by the supreme court, they need not be noticed here. The auditor reported, that there was a balance due to the plaintiffs of \$115,99. The defendant filed exceptions to the report.

The county court, April Term, 1845,—WILLIAMS, Ch. J., presiding,—overruled the exceptions and rendered judgment for the plaintiffs upon the report. Exceptions by defendant.

E. F. Hedges for defendant.

1. The statute of limitations of 1797 bars the claim. The defendant does not come within the excepting clause of the statute of 1832, which governs this case. The replication does not well aver him to be within it. *Plummer v. Woodburne*, 4 B. & C. 625. 1 Chit. Pl. 584. *Marssteller v. M'Clean*, 7 Cranch 156.

2. The statutes of limitation of New York are applicable here. Statutes of limitation affect the remedy only while their provisions and conditions are *inchoate*; but when the bar is perfected, they then apply to the contract; and wherever that goes, it must carry with it the disability. *Bulger v. Rocke*, 11 Pick. 36. The parties being resident in New York, and the contract being made and payable there, the courts of this state will decide the rights of the parties, as they exist in that state. Story's Confl. of Laws 30—37, 332, 484. *Greenwood v. Curtis*, 6 Mass. 358.

3. The presumptive bar, arising from lapse of time, attaches here,

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G. W. Harmon for plaintiffs.

The plaintiffs' cause of action was not barred by the statute of limitations of this state; and, the remedy being sought in this state, the statute of New York cannot apply. Sl. St. 291, § 10. Rev. St. 309, § 29. This court has in several instances put a construction upon the statute, which is decisive of the present case; *Mazoron v. Foot*, 1 Aik. 232; *Dunning v. Chamberlain*, 6 Vt. 126; *Hill v. Bellows*, 15 Vt. 727. Similar decisions have been made in other states; *Ruggles v. Keeler*, 3 Johns. 264; *Dwight v. Clark*, 7 Mass. 515; *Sissons v. Bicknell*, 6 N. H. 557. The *lex fori*, and not the *lex loci*, governs this case; *Lincoln v. Battelle*, 6 Wend. 475; *Andrews v. Herriott*, 4 Cow. 508; 3 Johns. 264; *Nash v. Tupper*, 1 Caine 402; *Medbury v. Hopkins*, 3 Conn. 473; *Atwater v. Townsend*, 4 Conn. 47.

The opinion of the court was delivered by

HALL, J. The decision of the question raised by the auditor's report depends upon the construction of the statute of limitations of 1797, which was in force at the time the cause of action in this case accrued. That statute, after limiting the time of bringing an action of account to six years, provides, [Slade's St. 291, § 10.] that when the debtor, at the time the cause of action accrued, was without this state, the suit might be commenced within six years after the coming, or return, of the debtor into this state. This is not the precise language of the statute, but is a substantial and direct application of its language to this case.

If a construction were now first to be put upon this statute, it is not seen how there could be any doubt in regard to it. It has, however, been repeatedly held, that this provision of the statute applies as well to persons who were citizens of other states, when the cause of action accrued, and whose *coming into the state* was from their places of permanent residence, as to citizens of this state, who had been temporarily absent. In *Dunning v. Chamberlain*, 6 Vt. 127, it was expressly held to apply to a case like the present, where both the debtor and creditor resided out of the state at the time the cause of action accrued. The 10th Section of the statute of 1797 is substantially the same as the English statute of 4 & 5 Ann c. 16; and the statutes of New York and Massachusetts contain similar

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provisions. These statutes have uniformly received the same construction, that has been given to the statute of this state. *Strithorst v. Graeme*, 2 Bl. R. 723. *Ruggles v. Keeler*, 3 Johns. 263. *Little v. Blunt*, 16 Pick. 359.

It has been urged, in this case, that, the account having accrued in the state of New York, and having become barred by the statute of limitations of that state, a suit ought not to be maintained upon it here; and the case has been likened to a contract made in another state, which would there be voidable for the infancy of the party, though the party was of sufficient age to contract, had he been within this state. It is said, such a contract would not be enforced here against the party, if infancy would be a good defence where the contract was made, and that the bar by the limitation in New York ought to have the same effect.

If we are to take judicial notice, without proof, that the plaintiffs' cause of action was barred by the law of New York, the objection cannot assist the defendant. The distinction between the two cases has been too long settled, to be now disturbed. The infancy is an infirmity in the contract itself, at its inception, depending upon the law of the place where it is made, and following and forming a part of it, wherever it is attempted to be enforced; while the limitation is held to affect the remedy merely, and not to attach itself to the contract.

The statute, indeed, seems to operate harshly upon the defendant in this case; and it is not improbable that its operation does him injustice. But the injustice of the statute, if it be unjust in cases like the present, is matter for the consideration of the legislature, and not for us. We are to administer the law as we find it.

It has also been urged in argument, that the lapse of time, connected with the circumstances of the near residence of the parties to each other, furnishes presumptive evidence of a payment of the plaintiffs' account, and that the judgment of the county court ought to be reversed for that reason. This objection, we think, comes too late. The question of presumptive payment is one of fact, depending upon the particular circumstances of the case. It does not arise, as matter of law, short of a period of twenty years; and even then it is but a presumption, subject to be removed by evidence. If

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the defendant had intended to raise this question, he should have made it before the auditor, that the defendant might have had an opportunity to rebut the presumption by proof.

These views are in conformity to long established principles of law, and are expressly recognized in *Dunning v. Chamberlain*, 6 Vt. 127 and in *Kimball v. Ives*, 17 Vt. 430.

The judgment of the county court is therefore affirmed.

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JOHN C. TERRITT v. EDWARD WOODRUFF.

The courts of this state are not bound to take judicial notice of the laws of another state; but they are to be made to appear to the court by evidence.

If the action, in which it becomes material to prove such laws, is on book account, they must be proved, as facts, before the auditor, and must be stated in the report;—and if nothing is stated in the report in reference to such laws, and the county court accept the report, *quare*, whether the supreme court will not presume that such laws are not variant from those of our own state upon the same point, and affirm the judgment.

In this action, which was on book account, the plaintiff, who was a counselor at law in the state of New York, but not an attorney, claimed to recover for services rendered by him in the courts of that state as an attorney, in the name of an attorney whose office he occupied, and who had consented that he might perform such services in his name, but between whom and the defendant there had been no communication; the auditors did not state, in their report, the law of New York in reference to the plaintiff's right of recovery for such services; and this court held, that they could not say, from any authorities produced before them, that the plaintiff would not be entitled to recover for these services, if the action had been commenced in the state of New York; and the judgment of the county court, which was in favor of the plaintiff upon the report, was affirmed.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and auditors were appointed, who reported, in substance, as follows.

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The plaintiff's account accrued for professional services rendered in the city of New York. The plaintiff was, at the time, a counselor, but not an attorney, of the New York bar; he did the business of an attorney, however, on his own account, in the office of a Mr. Crist, a practising attorney in the city, under a general permission, which he had from Crist, to transact an attorney's business in his name. There was never any communication or privity whatever, relative to the account in question, between the defendant and Crist. The plaintiff's employment by the defendant, and his performance of the services charged, in the name of Crist as attorney of record, were shown; and it appeared that the items of cost, claimed by the plaintiff as between attorney and client, were taxed and certified by the proper officer, and that, as taxed, they were in conformity with the New York fee bill. The auditors reported that there was a balance due to the plaintiff of \$284,55.

The defendant excepted to the report, alleging that the auditors had allowed to the plaintiff charges of fees, which are allowed, by the laws of the state of New York, to the attorney or solicitor of record alone, and which can only accrue to, or be recovered by, such officer of the respective courts in which the same accrued.

The county court, April Term, 1846,—WILLIAMS, Ch. J., presiding,—accepted the report and rendered judgment thereon for the plaintiff, for the sum reported by the auditors. Exceptions by defendant.

S. H. Hedges, for defendant, insisted, that the plaintiff's right of recovery depended upon the law of the state of New York, and that the fees charged in his account could only be recovered, in that state, by attorneys and solicitors, in their character of officers of the court; and he cited 2 Rev. St. of N. Y. 622; *Seymour v. Ellison*, 2 Cow. 13; *In re Wood*, 2 Cow. 29, note (b); *Stewart v. New York Common Pleas*, 10 Wend. 597; *People v. Steuben Common Pleas*, 12 Wend. 200; *Vincent v. Holt*, 4 Taunt. 452.

C. B. Harrington, for plaintiff, contended, that however the plaintiff's right of recovery might be regarded under the *lex loci contractus*, yet that his remedy in this action must depend upon and be governed by the *lex fori*; and he cited *Pickering v. Fisk*, 6 Vt.

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102; *British Linen Co. v. Drummond*, 21 E. C. L. 194; *De la Vega v. Vianna*, 20 Ib. 387; *Shaw et al. v. Harvey*, 22 Ib. 374. 2 Johns. Cas. 321. 1 Sw. Dig. 324.

The opinion of the court was delivered by

HALL, J. The auditors' report in this case finds, in substance, that the defendant employed and retained the plaintiff in the city of New York, as counsel, or attorney, to attend to the prosecution of certain suits in the courts of the state of New York, and that he rendered the services and made the disbursements, charged in his account, under such employment and retainers. Upon this state of facts there can be no doubt, that the plaintiff, provided the services had been rendered in this state, would have been entitled to recover.

But it is objected, that the plaintiff was incompetent, by the laws of New York, to perform the services, and that he is therefore not entitled to recover. This objection is founded upon the farther finding of the auditors, that the plaintiff was at the time only a counsellor, and not an attorney,—that the plaintiff did the business of an attorney on his own account in the office of a Mr. Crist, a practising attorney of said city, under a general permission from Crist to transact an attorney's business in his own name,—and that there was no communication or privity whatever in relation to the account between Crist and the defendant.

In this state the qualifications and rights of counsellors and attorneys are the same; whoever is a counsellor is also an attorney; and in order to defend against a claim, which, by our laws, is both legal and meritorious, it ought to be clearly made to appear, that, by some invincible law of the state where the services were rendered, the plaintiff would be debarred of a recovery.

The courts of this state are not bound to take judicial notice of the laws of another state; but they are to be made to appear to the court by evidence. For the purpose of proving the statutes of another state it has been held, that the printed statutes of the state, published by the authority of such state, may be read; and that the unwritten or common law of the state may be proved by the testimony of witnesses conversant with its laws. *State v. Stade*, 1 D. Chip. 303; *Danforth v. Reynolds*, 1 Vt. 265; *Woodbridge v. Austin*, 2 Tyl. 364. But whether the reported decisions of the courts of such state

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may be introduced as proof of the unwritten laws, or as evidence of the construction of a local statute, does not appear to have been determined.

Admitting that the laws of another state should in some way be proved as facts, the question arises, whether this proof should not have been made before the auditors. It is their business to find facts; and it is only for some error of law, upon the facts found, that their report can be set aside. They have not reported what the law of New York is, as applicable to the other facts in the case; and if the judgment of the county court, accepting their report, is now to be set aside, upon the ground that they have mistaken the New York law, it follows, that we must, sitting as a court of errors, receive evidence of what the law of New York is, applicable to the case; unless, indeed, we are to take the same judicial notice of the laws of that state, that we would of the laws of our own.

Perhaps the auditors may have found the fact, that the law of New York was the same in regard to the plaintiff's right of recovery, as the law of this state; in which case there was no error in their report, and none in the judgment of the county court accepting it. As the report is silent, as to what the law of New York is, and as, without proof, I think it should not be taken to be variant from the law of this state, I am inclined to think, that the judgment of the county court should be affirmed, without farther inquiry. But as this is a question of much practical importance, and has not been argued, it is not intended to decide it.

In order to satisfy the court, that the plaintiff would not be allowed to recover his account in the state of New York, the counsel for the defendant have produced the following authorities; 2 Rev. Stat. of N. Y. 622; *Seymour v. Ellison*, 2 Cow. 13; *In re Wood*, 2 Cow. 29, note; *Stewart v. New York Common Pleas*, 10 Wend. 597; and *People v. Steuben Common Pleas*, 12 Wend. 200.

The statute referred to provides for the allowance of certain fees for services done or performed in the several courts of that state "by the officers thereof," enumerating the fees for attorneys, clerks, criers, &c. The cases in the 2d of Cowen's Reports are to the purport, that attorneys, solicitors and counsellors are officers of the courts, and *perhaps* public officers, under the constitution of the state. The two cases in Wendell's Reports are to the effect, that a

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party, not an attorney, who conducts or defends a suit in person, is not entitled to recover costs of the opposite party, because the statute contemplates, that the services enumerated in the fee bill must be rendered by the officers of the court.

We think these authorities fall short of showing, that the plaintiff would not be entitled to compensation for his services in the state of New York. The cases in Wendell apply only to the taxation of costs between party and party; and it is not very clear, from the language of the statute, that it was intended to prescribe a rule for the charges of an attorney to his client. But if it were so intended, it does not necessarily follow, that the plaintiff must perform his services without compensation. Costs are not recoverable by party against party at the common law; but their recovery is founded alone on statute provisions. Without this statute, a party would not be entitled to recover any costs of the opposing party; and there is a manifest propriety in holding, as was done in the two cases in Wendell's Reports, that, in order to recover costs, a party must comply with the requirements of the statutes,—that where there was no attorney, the fees to be taxed for an attorney should not be allowed.

But the right to recover for services rendered and disbursements made at the request of another, and for his benefit, is a common law right, founded on the innate principles of justice, and needed no statutory provision to make it available. In the one case, it was necessary for the statute to give the right; in the other, the right exists, unless the statute has taken it away. No prohibitory clause is found in the statute, against the recovery, by others than an attorney, for services rendered and disbursements made in a suit; and no authorities are shown, that the statute has received such a prohibitory construction. And we cannot say, from the authorities produced, that a counsellor, rendering at the request of another and for his benefit the services of an attorney, through the instrumentality of an attorney, must necessarily, by the laws of New York, render them without compensation. It may be that such is the law of that state; but it not having been shown to us to be so, we think the judgment of the county court should be affirmed.

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JOEL M. ROGERS v. THE DANBY UNIVERSALIST SOCIETY.

The principles, as to the right of an individual to bring a suit at law against a corporation, of which he is a member,—as to the right of one committee-man, trustee, or agent, among several jointly constituted, to recover in an action on book account for services and expenditures performed and made on his own private account for the corporation,—and as to the authority of these subordinate agencies to pledge to each other, individually, the responsibility of the body for whom they act,—as decided in *Geer v. School District No. 10 in Richmond*, 6 Vt. 76, and in *Sawyer v. Meth. Ep. Soc. in Royalton*, 18 Vt. 405,—recognized and affirmed.

Where several individuals signed articles of association, for such purposes as are contemplated by the statutes of October 26, 1797, and November 10, 1814, and the form adopted was substantially in conformity to the one prescribed, and provided for the election of three trustees, a secretary, treasurer and other officers, and no words were used indicating an intention not to form themselves into a body corporate, it was held, that they became a body corporate, under those statutes, notwithstanding they did not describe themselves as inhabitants of any town and made no reference, in their articles of association, to the first section of the statute of 1797.

And where, in such case, the association was formed for the purpose of building a meeting house, and by one of the articles the capital stock was fixed at \$2,500, and by another the size and style of finishing the house were prescribed, it was held, that the article fixing the amount of capital stock could not be regarded as limiting the cost of the house, and that one of the trustees, who had rendered services and made expenditures in constructing the house, on his own account, in pursuance of a contract between him and the other trustees, might recover therefor in an action on book account against the association, notwithstanding the whole cost of the house much exceeded the amount of the capital stock.

And it was held, that the defendants, in such case, could have no claim to recover against the plaintiff, who was one of the trustees, the amount of demands due to the association, which were left by the trustees with an attorney at law for collection, and were settled with him, but never accounted for to the plaintiff.

And it was also held, that the defendants had no right to claim, in this action, that there should be an amount deducted from the plaintiff's account, equal to his proportion of the outstanding debts of the association, taking his subscription and the aggregate of all the other subscriptions as the basis of computation.

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BOOK ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows.

The defendants organized, March 1, 1838, and from that time transacted business, by the name of The Danby Universalist Society. The articles of association expressed the purpose to be the building of a meeting house. By the first article it was provided, that the officers of the association should consist of a president, vice-president, secretary, treasurer, a board of trustees consisting of three members, and a prudential committee consisting of seven members, and should be elected annually, and should be liable to removal at any time by a vote of two thirds of the members. By the fifth article it was made the duty of the board of trustees to do all things necessary to the building of the house, and they were empowered to make all contracts, and purchase materials, necessary to building and finishing the house, and the acts of a majority were made binding, if in accordance with the articles of association. By the seventh article it was provided, that the capital stock of the association should be two thousand five hundred dollars, to be divided into one hundred shares, of twenty five dollars each. By the tenth article the location, size and style of finishing the house were provided for. By the sixteenth article the trustees were empowered to commence building the house when the sum of fifteen hundred dollars should be subscribed. It was not stated in the articles of what town the subscribers were citizens, nor was any allusion made, in terms, to any statute law of this state. These articles were signed by the members, and, among others, by the plaintiff, and to the name of each was annexed the sum which he agreed to pay towards building the house. The plaintiff's subscription was two hundred dollars. The amount of all the subscriptions was less than twenty five hundred dollars. The plaintiff was elected and acted as one of the board of trustees from the time of the organization of the association until the hearing before the auditor. The meeting house was erected and finished, under the direction of the trustees, at a cost of nearly five thousand dollars,—twenty seven hundred dollars of which it appeared remained due at the time of the hearing before the auditor; and it also appeared, that there were then some debts due to the society; but the amount was not shown. The house was

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accepted by the society, and was dedicated and used for the purposes contemplated in the articles of association. The plaintiff's account accrued for services rendered and advances and payments made by him, as one of the trustees, on liabilities created by the trustees against the society for building the house; and the auditor reported, that there remained a balance due to him of twelve hundred and seventy three dollars and eighty two cents.

The defendants claimed, that the plaintiff should account for the amount of certain demands, which were placed by the trustees in the hands of one Bucklin, an attorney at law, (since deceased,) for collection, and which were settled with him, but the avails of which were not received by the plaintiff; and whether they were received by either of the other trustees did not appear;—but the auditor disallowed the claim.

The defendants also insisted, that the plaintiff was liable to contribute, with the other members of the society, to the payment of the outstanding debts of the society, in the same proportion that his subscription bore to the aggregate of the subscriptions of the other members; and it was agreed, that the plaintiff's contribution, upon this mode of calculation, would be four hundred dollars; but the plaintiff objected to any such liability,—and, there being no facts proved relative to this matter, other than those already stated, the auditor disallowed the claim.

The defendant filed exceptions to the report; and the county court, September Term, 1845,—WILLIAMS, Ch. J., presiding,—overruled the exceptions, and rendered judgment for the plaintiff for the whole amount found due by the auditor. Exceptions by defendants.

S. H. Hedges for defendants.

1. The proof before the auditor did not show, that there was any such corporation in existence as The Danby Universalist Society. The articles of association, by which alone the subscribers are bound, make no reference to the statute of 1797, as required by the statute of 1814. Slade's St. 602. They make no allusion to their being a corporate body; neither do they claim the exercise of corporate powers. To hold them a corporation would render it difficult to distinguish between a mere association and a corporation,

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and nearly impossible to associate for purposes within the scope of such statutes, without being incorporated.

2. If it should be held, as suggested in *Burr v. Smith*, 7 Vt. 281, that these associates were so far organized, that they might sue and be sued, still we insist that they remain mutually liable for their respective shares of their joint debts; and therefore,—1, No one of them can sue the association at law;—2, If they can, the plaintiff's share of the joint debt should have been deducted from his claim. *Christian Soc. in Plymouth v. Macomber*, 5 Metc. 155.

3. The plaintiff and his co-trustees had no authority to incur expenses so greatly exceeding the means of the association, and thus encumber the property with debt and embarrass, if not defeat, their enterprise.

Dexter and Thrall & Pond for plaintiff.

The society became a corporation, and, for the purposes specified, had all the powers of a corporation. A member of a corporation may sue the corporation, or be sued by it. The trustees, being directed to build and finish a meeting house of certain dimensions and after a certain plan, and being continually under the direction of the society, were not limited in the amount of expenses to the original stock, or subscriptions. While the plaintiff seeks to recover against the society, as a corporation, he is not bound to contribute to pay its debts. If he sought in chancery to have the individual members contribute to pay his claim, they might then ask him to contribute also.

The opinion of the court was delivered by

DAVIS, J. Several questions raised in this case must be considered as definitely settled by the cases of *Geer v. School District No. 10 in Richmond*, 6 Vt. 76, and *Sawyer v. Meth. Ep. Society in Royalton*, 18 Vt. 405. Such, in particular, as concern the right of an individual to bring a suit at law against a corporation, of which he is a member,—the right of one committee-man, or trustee, or agent, among several jointly constituted, to recover in his private character, in this form of action, for services and expenditures performed and made on his own private account for the corporation,—and

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the power and authority of these subordinate agencies to pledge the responsibility of the body, for whom they act, to each other individually, as well as to any other persons.

There is, perhaps, some incongruity in thus allowing a person to act in this double capacity, as an agent for the corporation contracting with himself as an individual. Some feeling of this kind seems to have suggested to the judge, who delivered the opinion of the court in the first case cited above, the remarks in relation to the authority of a majority of a building committee to enter into a contract with another member. I apprehend, however, there is no occasion to resort to a supposition of this kind. Whether a majority, or the whole, act, the party contracted with may, as well as any other, participate in the bargain. It is, in effect, an application of the same principle, which sanctions a contract between any corporation and an individual member. It is doubtless true, as suggested in the dissenting opinion of *Phelps*, J., in the same case, that there is reason to apprehend favoritism and partiality in such cases. So there is reason to apprehend partiality and perjury in permitting a party to establish his right to recover by his own oath. Neither in one case, nor the other, is the danger so imminent, as to justify the establishment, on principles of policy, of an irrefragable rule adverse to the received doctrine. Partiality, in any given case, so gross as to amount to fraud, will, when sustained, necessarily defeat the contract.

Other objections have been made to the plaintiff's right to recover in this case, which it becomes necessary to consider.

It is urged, that no such corporate body as the Danby Universalist Society existed.

That certain persons, in that town, on the first of March, 1838, entered into an association for the purpose of building a meeting house in the town, under a written agreement containing a variety of articles, providing for the election of three trustees, a secretary, treasurer, &c., which was subscribed by a number of persons, is admitted. But it is denied, that the association is in the form prescribed by the statute of Nov. 10, 1814, in addition to that of Oct. 26, 1797, or that it had any reference to either of those statutes, or that any intention existed to form a body corporate and politic.

On examining the articles and constitution subscribed, it is apparent, that the statute form is not followed in several particulars;

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chiefly in the following; that the subscribers do not describe themselves as inhabitants of Danby, or any other town, and make no reference to the first section of the statute of 1797. Nevertheless, as the purpose for which the association was formed is one expressly contemplated in those statutes, the form adopted is substantially in conformity to the one prescribed, and no words are inserted indicating an intention not to form themselves into a corporate body, we have found no great difficulty in coming to the conclusion, that such a body was duly constituted. The machinery provided in the articles for carrying on conveniently the common concerns of the association, such as the election of a president, vice-president, secretary, treasurer, trustees, prudential committee, &c., all to be chosen annually, to hold office until others should be elected, subject to removal, however, by a vote of two thirds of the members,—most of which would be quite unnecessary in a mere voluntary association of individuals for a temporary purpose,—would seem naturally to impel us to the same conclusion.

A farther objection is made on account of the amount expended for the house being nearly five thousand dollars, while by Art. 7 the capital stock is fixed at two thousand five hundred dollars, and the whole amount actually subscribed was something less than that sum. There is nothing in the law, or in the articles, unless it be the one cited, limiting the responsibilities the corporation may incur in the prosecution of their object, nor the property, real, or personal, which they may lawfully hold. Another article determines the location of the house, the size, number of stories, the interior and exterior style of finishing, &c. The trustees were directed to proceed with the undertaking, as soon as the aggregate amount of subscriptions should reach the sum of fifteen hundred dollars.

It is probable, that, when these matters were arranged, it must have been known, that the house would, or at least might, cost more than \$2,500; at all events no restrictions, in that respect, were imposed upon the trustees. Were the question, then, one directly between the defendants on the one side and the three trustees, acting jointly in that capacity, on the other, we could not say, from any facts disclosed in the report of the auditor, that they transcended in their expenditures the authority vested in them. Neither improvidence nor extravagance are shown; and the house, such as it was,

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was subsequently accepted, dedicated, occupied and improved by the defendants for the purpose contemplated.

Still less should we be inclined to say, when the duly authorised agents of the defendants contracted with an individual to furnish materials, or perform labor on the house, that his right to recover compensation therefor must depend upon the final contingency, that the whole amount of similar contracts, previously and subsequently made, should not transcend the instructions of the principals. Though that individual should happen, as in this instance, to be one of the agents, it could not vary the principle, though its absurdity and injustice might be somewhat less obvious.

But we do not regard the article, fixing the amount of capital stock, in the light of an instruction, or limitation, as to the expense of the house. It seems rather to have indicated the amount of funds to be raised in the first instance in that particular mode. A similar objection was raised in the case of *Sawyer v. Meth. Ep. Soc. in Royalton*, depending upon a somewhat different state of facts.

The decision of the county court in respect to the notes taken by Bucklin was clearly right,—as also in respect to the claim, that an amount should be deducted from the plaintiff's account, equal to his proportion of the outstanding debts of the society, taking his subscription and the aggregate of all the other subscriptions as the basis of computation,—making the sum of about four hundred dollars. The plaintiff, as a member of the corporation, will be liable, like any other members, to an assessment, or otherwise, if any are so liable, for the payment of this debt, and all other debts, which the society owe. But we have no occasion to determine in what manner this judgment is to be satisfied. The amount for which the plaintiff is entitled to recover cannot be affected by considerations growing out of contingent liabilities hereafter.

The judgment of the county court is affirmed.

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GEORGE W. STRONG v. RUFUS RICHARDSON.

If, in an action of account between tenants in common of land, the interest of each is not sufficiently set forth in the declaration, or if the fact of the receipt, by the defendant, of an undue proportion of the rents and profits is not properly stated, the proper course on the part of the defendant is to demur.

An allegation in the declaration, in such case, that the plaintiff and defendant were "joint and equal owners" of the land described, would probably be insufficient, on demurrer, as a statement of the tenancy; and an averment, that the defendant had the charge and administration of the land, and the possession thereof, and cut, sold and used timber to a large amount, and of a large value, "to render account for the same" to the plaintiff, is an insufficient statement of the reception, by the defendant, of an *undue proportion* of the profits. DAVIS, J.

But where the defendant, instead of demurring to such declaration, pleaded in bar, that he was not the bailiff of the plaintiff for the period claimed, and that the parties were not the joint and equal owners of the land in question, and that the defendant was not bound to account for whatever timber he cut and removed, adopting negatively the words of the declaration, and the issue joined thereon was found for the plaintiff, and judgment to account was thereupon rendered, it was held, that the defendant was precluded from taking advantage of the defects in the declaration, and that the defendant must be held liable to account. *

ACCOUNT. The plaintiff alleged in his declaration, that the parties, from July 31, 1841, until the commencement of this suit, were the joint and equal owners of lot No. 24 of the third division of lots in Mendon, and that the defendant had the charge, administration and possession of the same, and cut, sold and used timber therefrom, to the value of \$1000, to render account for the same to the plaintiff, when thereunto afterwards requested. The defendant pleaded in bar, that he was not the bailiff of the plaintiff for the time specified in the declaration, that the parties were not the joint and equal owners of the land specified, and that the defendant was not bound to account to the plaintiff for the timber which he had cut, sold and used from the land during the time;—and upon this plea issue was joined to the court.

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On trial by the court, September Term, 1844,—WILLIAMS, Ch. J., presiding,—the plaintiff gave in evidence deeds, showing that he was the owner of one undivided half of the lot of land described in his declaration, and gave evidence that the defendant was the owner of the remaining undivided half of the same lot; and he also gave evidence tending to prove that the defendant had cut timber upon the land and sold it.

The court decided, that the defendant was bailiff and receiver of the plaintiff, and rendered judgment to account. Exceptions by defendant.

An auditor was appointed, who reported, at a subsequent term of the court, that the plaintiff claimed to own one undivided half of the lot of land in question and the defendant owned the other half; that the defendant, subsequent to the acquiring of title to the lot by the plaintiff, had cut and carried away from the land a quantity of timber; and that a much larger quantity of the same kind of timber had been left standing on the premises, than what the defendant had so cut down. And the auditor found, that there was due to the plaintiff \$58,50, being one half of the value of the timber so cut by the defendant,—subject to the opinion of the court upon the plaintiff's right of recovery.

The court accepted the report, and rendered judgment thereon for the plaintiff to recover the sum reported;—and the case was passed to this court for trial upon the exceptions reserved by the defendant.

Pierpoint and Thrall & Pond for defendant.

1. This is an action of account at common law; the declaration does not state those facts, which bring it within the purview of the statute. At common law no action of account could be sustained in favor of one joint tenant, or tenant in common, against the other, although he received all the profits, unless he was actually appointed bailiff, or receiver. 1 Bac. Abr. 17. Co Lit. 172 a; 186 a; 200 b. 1 Selw. N. P. 2. In this case there was no evidence of such appointment, and therefore the action, at common law, could not be sustained.

2. In actions founded upon the statute [Rev. St. c. 36, § 1] it is necessary to allege and prove, not only that the defendant was ten-

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ant in common, or joint tenant, with the plaintiff, but that he has received more than his just proportion of the profits. *Brinsmaid v. Mayo*, 9 Vt. 31. *Ganaway v. Miller*, 15 Vt. 152. *Wheeler v. Horne*, Willes 208. 1. Petersd. 142. There being no such allegation in the declaration in this case, the plaintiff cannot recover under the statute.

3. But by the report of the auditor it appears, that the defendant has not received more than his just proportion. We contend, that for this reason the plaintiff cannot recover.

Ormsbee & Edgerton for plaintiff.

1. The expression "joint and equal owners," in the declaration, imports a tenancy in common. 6 Cruise, Tit. 39, c. 15, §§ 10-14, 17, 26. *Denn v. Gaskin*, Cowp. 657. *Lewis v. Cox*, Cro. Eliz. 695. 2 Bl. Com. 180, n. 4. 3 Bac. Abr. 198, (6 Ed.) citing *Warner v. Hone*, Abr. Eq. 292.

2. The allegations in the declaration were denied by the plea and were sustained by the evidence; the judgment to account was therefore correct. Any supposed informality in the declaration should have been taken advantage of by demurrer, or by motion in arrest of judgment. *Onion v. Fullerton*, 17 Vt. 359. *Moore v. Wilson*, 2 D. Ch. 91.

The opinion of the court was delivered by

DAVIS, J. It is not doubted, that, under our statute, the action of account is a proper mode to equalize the reception of rents and profits between tenants in common of an estate, where one tenant has received more than his just share. If the interest of each is not sufficiently set forth in the declaration, or if the fact of the receipt of an undue proportion is not properly stated, the proper course on the part of the defendant is to demur. In the present case, although the defendant contends, that the plaintiff's declaration is vicious in both of these particulars, yet, instead of demurring, he chose to plead in bar, that he was not the bailiff of the plaintiff for the period claimed, and that the parties were not the joint and equal owners of the land in question, (being lot No. 24 of the third division of lands in Mendon,) and that he was not bound to account for whatever timber he cut and removed,---adopting negatively the language of

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the declaration. The issue was thus formed, and, by consent, was tried by the court, and was found for the plaintiff. This closes the controversy, so far as the facts are concerned, in respect to the obligation to account.

The ulterior proceedings have determined, as is to be presumed, the true state of the accounts between the parties. The defendant now falls back upon the declaration, and insists that it is so defective, that no judgment ought to be given upon it in favor of the plaintiff.

Had the objections now urged been taken seasonably by demurrer, we have no doubt they must have prevailed. In the light of the cases of *Brinsmaid v. Mayo*, 9 Vt. 31, and *Ganaway v. Miller*, 15 Vt. 152, we are satisfied the declaration could not have withstood a demurrer, upon either of the points above indicated. The tenancy is stated in these words, "were the joint and equal owners of lot" &c. Here is no distinct statement of the amount of interest of either, whether a moiety, or a less quantity, nor, consequently, whether they were the only tenants in common of the lot, or whether others were associated in interest with them. There is an equal, if not a greater, want of explicitness in stating the reception by the defendant of an undue proportion of the profits; it being merely said, that he had the charge and administration of the land and the possession thereof, and cut, sold and used timber to a large amount, and of a large value, "to render account for the same" to the plaintiff. As was said by the court in *Brinsmaid v. Mayo*, this is, at most, stating the requisite point by way of inference; and if the matter had been presented here as it was there, the result must have been the same.

After a plea filed, however, which presented an issue of fact, and that found by the court for the plaintiff, which is equivalent to a verdict of a jury, the case is in the same situation, as if it were upon a motion in arrest, after verdict, for deficiencies of the declaration. In such a stage, the party has lost the advantage of many objections, which would have availed him, if insisted upon at an earlier period. The ordinary rule, in such case, is familiar to every one. The only difficulty is in the proper application of it to the almost infinitely diversified circumstances which may arise.

We are of opinion, upon mature consideration, that the objections urged to this declaration fall within that class which are foreclosed by a verdict. The documentary evidence in respect to the tenancy,

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made a part of the case, leaves no doubt, that the parties were tenants in common, each of a moiety; and all other circumstances necessary to charge the defendant appear upon the face of the auditor's report. On both points the declaration is not entirely silent, but certainly inartificial and inexplicit.

The result is, the judgment of the county court is affirmed.



JAMES WINCHELL v. ASAHEL POND.

That section of the Revised Statutes, [Rev. St. c. 11, sect. 26,] which provides, that "No sheriff, or deputy sheriff, shall be allowed to make any writ, declaration" &c., must be so construed as to include constables, also. The term "sheriff," as used in this section and several others in the same chapter, may be regarded as a generic, not a specific, term, comprehending the whole class of executive officers, whose duties are of like nature.

A writ filled up by a constable is void, and will be dismissed by the county court on motion, although the case may have come to that court by appeal, and the defect may not have been seasonably taken advantage of by plea in abatement, and although the writ was filled up by the constable at the request of the attorney for the plaintiff and under his supervision.

ASSUMPSIT upon a promissory note. The action was commenced before a justice of the peace and came to the county court by appeal. At the term at which the appeal was entered, the defendant moved that the action be dismissed, for the alleged reasons, that the original writ was made by the constable, who served the same, and that no sufficient recognizance was taken to the defendant for his costs. It appeared, that the writ was served by the constable of Poultney, and that he filled the writ at the request of the attorney for the plaintiff and under his supervision. It also appeared, that the writ was signed in blank by the justice of the peace, before whom it was made returnable, and that the name of the recognizor was inserted at the time the writ was filled and in the absence of the justice.

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The county court, April Term, 1845.—WILLIAMS, Ch. J., presiding,—decided, that the proceedings were void, for the reason that the officer, who served the writ, filled the same, and that, in this respect, constables are, by the statute, under the same disabilities with sheriffs and deputy sheriffs; and the suit was dismissed. Exceptions by plaintiff.

W. H. Smith for plaintiff.

1. It is contended, that the constable did not, in this case, in legal contemplation, *make* the writ. The facts show, that he acted as the mere amanuensis of the attorney.

2. We insist, that constables are not, by the Revised Statutes, laid under the same disabilities, in this particular, with sheriffs and deputy sheriffs; and that *constables* may make writs. Sheriffs and deputy sheriffs are expressly restricted, but nothing is said of constables. All these officers were equally prohibited by the former statute. Slade's St. 204, § 12. This is not an isolated case of distinction between these officers in the Revised Statutes. Sheriffs and deputy sheriffs are prohibited appearing in court, or before justices, as counsel, or attorneys; while constables are not; Rev. St. 75, § 25. All these officers were equally prohibited by the former statutes. Sl. St. 204, § 12. Nor can this be claimed as the result of an unintentional omission in the legislature, when we find, that, by other restrictive provisions in the Revised Statutes, both sheriffs and constables are included. Rev. St. 75, §§ 25–28. We are not called upon to discuss the propriety of placing sheriffs and constables under the same restrictions in any or all these respects. If the legislature has not provided a remedy for every existing evil, this court will not supply the defects, but will decide upon the law as *expressed*.

14 Vt. 340.

Everts and Harris for defendant.

1. No regular or sufficient recognizance was taken upon the issuing of the original writ in this case. Rev. St. c. 28, § 5. 1 Aik. 379.

2. The case is within the spirit of the statute respecting sheriffs and deputy sheriffs. Rev. St. c. 11, § 26; c. 13, § 60.

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The opinion of the court was delivered by DAVIS, J. One of the grounds, on which the motion to dismiss was made,—that is, the not taking a proper recognizance for costs on issuing the writ,—seems not to have been passed upon by the county court; of course it is not before us. The only question is, whether the county court were right in dismissing the action, for the reason that the original writ, which was returnable before a justice of the peace, was made or filled up by the constable of Poultney, who served the same.

The motion is founded upon section 26 of chap. 11 of the Revised Statutes,—which enacts, that “no sheriff, or deputy sheriff,” shall be allowed to make any writ, declaration, plea, &c., except in his own case,—declaring all such acts to be void, and that all such writs and proceedings shall be dismissed. Constables, not being particularly named, it is supposed by the plaintiff’s counsel are not comprehended within the true spirit and meaning of the statute. Whether so, or not, is the question now to be determined.

We attach no importance to the circumstance, that the same officer, who filled the writ, also served it. If served by any other officer, the objection would be equally available. Nor is it a matter of any consequence, that it was presented in the form of a plea in abatement before the magistrate. As mere matter in abatement, if it were such, it came too late,—not being pleaded until after one continuance. If there be any thing in the objection, it is one of substance, and not of form merely,—the statute declaring the process void.

In arriving at what a majority of the court deem a correct construction of this statute, it is proper to say farther, that the circumstance, that the former statute on the same subject, superseded by the present revised code, expressly comprehended constables within its prohibition, is not regarded as at all decisive either way. The omission of that word in the present law is susceptible of other explanation, than an intention to exempt that class of officers from its operation. Inadvertence, or a belief that it was not necessary, in every successive section of a statute embodying numerous provisions, intended to secure a prompt, effectual and impartial service of all process by the various officers entrusted with that duty, to repeat perpetually each class, would afford a satisfactory explanation.

Every consideration of policy, applicable to sheriffs and their

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deputies, in respect to this subject, seems to apply with nearly equal force to constables. Their powers, duties and liabilities are the same, with the exception that their sphere of operation is less extensive, generally,—but co-extensive with respect to a large class of precepts, subject to the consent of the towns, respectively, in which they reside. There are peculiar duties, it is true, superadded in relation to the collection of taxes. The same mischiefs, to a considerable extent, would result from their being permitted to combine their appropriate business with that of counsel and attorney. They are essentially incongruous; and every principle of sound policy and expediency requires them to be kept separate and distinct. Upon principles of construction, then, every where recognised, we feel at liberty to disregard the mere letter of the statute, and give it a scope and meaning broad enough to effectuate the beneficial purposes it had in view.

If a penalty were the consequence of a disregard of the prohibition, upon principles of construction equally well settled the subject would be entitled to a very different consideration. For instance, by sect. 21 of the same statute, if any sheriff, or deputy sheriff, shall wilfully neglect, or refuse, to serve or return any lawful writ or precept delivered to him, or make a false return thereon, he shall be subject to pay a fine, not exceeding one hundred dollars, and also to pay to the party aggrieved all damages and costs. So far as the fine is concerned, constables, not being named, could not be subjected to it; but I apprehend they can claim no exemption from responsibility in damages to the party injured.

Numerous other provisions, in the same chapter, leave no doubt that they are equally within the spirit and meaning of the law with other officers, though not named. Sect. 10 authorises every *sheriff* to preserve the peace, suppress riots, tumults, &c.; and sect. 11 says, every *sheriff* and *other officer*, in the discharge of the duties indicated in the preceding section, may require suitable aid and assistance. Here the statute itself has applied the same principles of construction, which this court adopt. Sheriffs and their deputies, in case of great opposition, are empowered, by the advice of two justices, to raise the militia, &c.; and if any person shall be killed or wounded in such case, the *sheriff* and *militia* are held guiltless. Deputies, in this last clause, are not named; but does any one sup-

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pose, that they would not equally be held guiltless? Every sheriff has power, in the day time, to enter and search houses and other buildings for any person, against whom he may have a warrant, and also to search for goods stolen, &c. Is there any doubt, that constables, in executing similar precepts, are armed with similar powers? By sect. 22 all process served by a *sheriff* is required to be returned, at the proper place of return, before the time set for trial. Does not the same obligation extend to constables? Perhaps, too, the provision subjecting sheriffs to fifteen *per cent.* interest for refusing, on demand, to pay over money collected on execution, may extend equally to constables, although not named, considering the extra rate of interest rather as enhanced damages, than as a penalty. Sheriffs and their deputies are authorized to execute all precepts in their hands at the time of going out of office;—was it ever doubted that constables could do the same?

These examples are sufficient, to show that the utmost precision is not always observed in the language of statutes, and that a literal adherence to their terms would often defeat their obvious intent and meaning. In this view of the subject the term *sheriff*, as used in sect. 26, and in several other sections in the same chapter, may be regarded as a generic, not a specific, term, a *nomen collectivum*, comprehending the whole class of executive officers, whose duties are of like nature.

The result is, the judgment of the county court is affirmed.



REUBEN R. THRALL v. JAMES R. NEWELL.

Words used in a contract are not to be construed in a frivolous or ineffectual sense, when a contrary exposition can be given them; and where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted, which would give effect to the instrument as a legal contract, rather than that which would render it inoperative.

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The defendant executed to the plaintiff a written assignment in these words, "I hereby assign to Reuben R. Thrall a note in my favor against Theodore Woodward and John H. Philips, dated 13th Nov. 1838, for one hundred and fifty dollars payable in one year from date with use for value received;" and it was held, that the words "for value received" were not merely descriptive of the note assigned, but that, *prima facie* at least, they imported a sufficient legal consideration for the assignment.

And it was held, that such instrument, in describing the property assigned as "a note," must be construed as an express warranty, on the part of the defendant, that it was a valid note, and that the signers were of sufficient capacity to contract, when they executed it;—and *quare*, whether such a warranty would not be implied from the sale, without words indicating an express warranty.

And where it appeared, in such case, that the note assigned to the plaintiff was invalid as to one of the signers, by reason of his insanity at the time he signed the note, and that an action upon the note had been successfully defended by him upon that ground, and that the other signer had removed from the state, it was held, that the plaintiff, in an action upon the warranty contained in the written assignment, was entitled to recover the difference between the actual value of the note and the amount appearing due upon it.

Assumpsit upon an alleged warranty, that a promissory note for one hundred and fifty dollars, transferred by the defendant to the plaintiff for a valuable consideration, and purporting to be signed by Theodore Woodward and John H. Philips, and bearing date November 13, 1838, was a good and valid note;—the plaintiff averring, that Woodward had recovered a judgment in his favor, in an action commenced by the plaintiff upon the note, upon the ground of his insanity at the time of signing it. Plea, the general issue, and trial by jury, April Term, 1846,—WILLIAMS, Ch. J., presiding.

On trial the plaintiff gave in evidence the note described in his declaration; which was in these words,—"Castleton, Nov. 13, 1838. 'For value received we promise to pay James R. Newell, or bearer, one hundred and fifty dollars in one year from date with use. '(Signed,) *Theodore Woodward; Jno. H. Philips.*" The plaintiff also gave in evidence a written instrument, signed by the defendant, dated February 18, 1839, which was in these words,—"I hereby assign to Reuben R. Thrall a note in my favor against Theodore Woodward and John H. Philips, dated 13th Nov. 1838, for one

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' hundred and fifty dollars payable in one year from date with use "for value received." The plaintiff also gave in evidence the record of a judgment in favor of Theodore Woodward against himself, in an action commenced by him against Woodward upon the note, and proved, that Woodward defended that action and recovered the judgment on the ground of his insanity at the time he signed the note, that the plaintiff reviewed, that Woodward died previous to the term of the court at which the action was to have been again tried, and that thereupon the suit was discontinued. To the admission of all this evidence the defendant objected; but the objection was overruled by the court. The plaintiff also gave evidence tending to prove that Woodward was insane, at the time he executed the note. It appeared that Philips removed from the state before the note became due; and it did not appear, that any attempt had been made to collect the note from him, except that the plaintiff, when the note became due, made a demand of payment at the house last occupied by Philips in this state, and gave immediate notice to the defendant of non-payment.

The defendant requested the court to charge the jury, that, notwithstanding they might find, from the evidence, that Woodward was insane at the time of executing the note, the plaintiff was not entitled to recover; and that the written assignment, executed by the defendant, did not furnish evidence of any consideration for the contract declared upon, or of any warranty, on the part of the defendant, as to the validity of the note against Woodward.

But the court instructed the jury, that the written assignment executed by the defendant did furnish evidence of the consideration of the contract declared upon; and that, if they found from the testimony that Woodward, at the time of executing the note, was incapable of making a contract by reason of his insanity, and that for that reason the note was void as to him, and that the suit instituted by the plaintiff against him was defended on that ground, the plaintiff would be entitled to recover the amount of the note and interest, notwithstanding he had made no attempt to collect the amount of the note from Philips.

The jury returned a verdict for the plaintiff for the amount of the note and interest. Exceptions by defendant.

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Ormsbee & Edgerton for defendant.

The instrument executed by the defendant was no evidence of any consideration having passed from the plaintiff to the defendant. The words "value received" are words of description merely, referring to and used in immediate connection with the other words, descriptive of the note, and obviously only intended to complete its description. The note is entirely different from a forgery. It is confessedly a good and legal note against Philips. If Woodward was insane at the time he executed it, in the absence of all knowledge of that fact on the part of the defendant, and, of course, of all fraud on his part, even if the note, as such, could not have been recovered of Woodward, the true value of the consideration, which passed to Woodward upon the execution of the note, might have been recovered. At all events, the plaintiff should have offered to return the note to the defendant, in order that he might pursue all his remedies, not only against Woodward, but against Philips.

Thrall & Pond for plaintiff.

1. The written assignment contained a warranty, that the note transferred was genuine, and that it was valid and due. 1 Sw. Dig. 435-9. Story on Bills 126. Bayl. on Bills 485, 148, n. 86. *Coolidge v. Brigham*, 1 Met. 547. *Lobdell v. Baker*, 3 Met. 469. *Herrick v. Whitney*, 15 Johns. 240. *Markle v. Hatfield*, 2 Johns 455. *Johason v. Titus*, 2 Hill 606. *Eagle Bank v. Smith*, 5 Conn. 71, 2 Bl. Con. 451. 1 Chit. Pl. 92. *Strong v. Barnes*, 11 Vt. 221.

2. The consideration alleged and proved was sufficient. *Brooks v. Page*, 1 D. Ch. 340. *Jerome v. Whitney*, 7 Johns. 321. *Waled v. Petrie*, 4 Wend. 575. 3 Johns. 485. 1 Vt. 247.

The opinion of the court was delivered by

HALL, J. It is in the first place insisted, in behalf of the defendant, that the written assignment furnished no evidence of a consideration for the contract. It is said, that the words "for value received," in the assignment, are not to be considered as forming a part of the contract of assignment, but as merely descriptive of the note. By comparing the note and assignment it will be seen, that (passing over the dates) the words "for value received" are the first in the note and the last in the assignment; and that therefore no

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argument can be drawn from the sameness in the order of the language of the two papers, that those words were copied into the assignment from the note. Indeed, if the mere order and appropriateness of language be considered, the words seem quite as naturally to belong to the assignment, as to be descriptive of the note. The objection concedes, that the words are not out of place in the assignment; for it proceeds upon the ground, that the assignment, without them, is without consideration and void. Upon that assumption the words are both appropriate and important, as part of the assignment. But as descriptive of the note, they are unnecessary and useless. The description is sufficiently perfect for all purposes of identity without them.

It is a rule of law, that words are not to be construed in a frivolous or ineffectual sense, when a contrary exposition can be given them; and where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted, which would give effect to the instrument as a legal contract, rather than that, which would render it inoperative. Chit. on Cont. 79, 80. Under these rules we think the words must be considered as forming part of the contract of assignment. Besides, if it were indifferent in all other respects, whether the words were to belong to the assignment, or to the note, they must be held as belonging to the assignment, under the final rule, where all others fail, that the language of a contract shall be construed most strongly against the contracting party. Chitty on Cont. 95-97.

The words "for value received" forming a part of the contract of assignment, they must be held to furnish sufficient evidence, *prima facie* at least, of a consideration for the assignment. *Lapham v. Barrett*, 1 Vt. 247. *Brooks v. Page*, 1 D. Ch. 340. *Whitney v. Stearns*, 4 Shepley 394. *Parish v. Stone*, 14 Pick. 198.

It is farther objected, that there was no sufficient evidence of the warranty of the validity of the note by the defendant.

It is said by Judge Phelps, in the *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 145, that, notwithstanding the cases of *Bree v. Holbeck*, Doug. 654, and *Price v. Neal*, 3 Burr. 1354, "it seems now to be well settled, that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness," but that the rule has not been extended to a case, where the party,

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when receiving or discounting the paper, is presumed, from his relation to it, to have the means of correct knowledge as to its genuineness. This view of the law is cited with approbation by the court in *Gilman v. Peck*, 11 Vt. 516, and seems, indeed, to be well supported by the more modern cases, both in England and in this country. *Jones v. Ryde*, 5 Taunt 488. *Fuller v. Smith, R. & M.* 49. *Young v. Cole*, 3 Bing. N. C. 724. *Markle v. Hatfield*, 2 Johns. 455. *Young v. Adams*, 6 Mass. 162. *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333.

In the present case the plaintiff, who received the paper, did not stand in any relation to the maker of the note, which would furnish him with the means of determining its genuineness; while the defendant, who procured the note to be discounted, did stand in such relation, being the payee of the note, and to whom it may be supposed to have been delivered by the maker; and there seems a peculiar propriety in holding him responsible for its genuineness. If one or both of the signatures to the note disposed of by the defendant had been forgeries, there would seem to be no question, but that the defendant would have been liable on an implied warranty; and the only real doubt is, whether such implied warranty extends beyond the fact of a mere forgery, and embraces a want of capacity in the party to make the contract. The cases before cited are all of forged paper, and no authorities are found, which are directly applicable to the precise question in this case. The case, however, of *Lobdell v. Baker*, 3 Metc. 469, has a strong analogy to the present; and seems, indeed, to have been decided on principles, that would make the implied warranty of one, who sells a note, extend to the capacity, to make a valid contract, of the parties, whose names appear upon it.

In that case the plaintiff had purchased a negotiable note in the market, but not of the defendant, which note had been endorsed by a minor, and the action was against the defendant for deceit in procuring the minor to indorse the note, and then putting it into circulation. No representation by the defendant, that the indorsement was valid, was shown, or any actual intention to defraud proved; but the court held, that the disposing of the note for a valuable consideration was, by necessary implication, an affirmation, that the indorser was a person capable of indorsing, and of binding himself by such indorsement; and, upon the ground of such implied affirmation,

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connected with his knowledge of the minority of the indorser, the defendant was held liable.

It is said by Mr. Rand, in his valuable edition of Long on Sales (204) that "there is an implied warranty in every sale, that the thing sold is that for which it was sold;" and the cases cited by him appear to sustain the doctrine. This rule seems well applicable to the sale of a written evidence of a liability, where the purchaser is understood to inquire for himself into the ability of the parties to the paper, but usually takes it for granted that the paper is genuine,—that it is signed by persons capable of binding themselves by contract.

I am therefore strongly inclined to think, that the defendant should be held liable upon a warranty of the note, implied by law from the sale of it. But it is unnecessary to put the decision on that ground, as we think the words of the assignment may be well construed as an express warranty, that the note was a valid note of the persons, whose names appeared upon it.

It seems to be well settled, that words of description in a bill of sale, or a bill of parcels, may be taken as a warranty, that the article sold is what it is described to be. *Tye v. Fynmore*, 3 Camp. 462. *Gardiner v. Gray*, 4 Camp. 144. *Bridge v. Wain*, 1 Stark. R. 504. *Shepherd v. Kain*, 5 B. & Ald. 240. *Hastings v. Lovering*, 2 Pick. 214. *Coolidge v. Brigham*, 1 Met. 547. In the case of *Coolidge v. Brigham* it was held, that a letter from the defendant to the plaintiff, inclosing a note and describing it as signed and indorsed by the persons, whose names appeared upon it, was an express warranty, that it was so signed and indorsed; and the name of the indorser proving to be a forgery, the defendant was held liable for an express warranty. In this case the note is described, in the assignment, as a note of the defendant "against Theodore Woodward and John H. Philips;" which is equivalent to saying it was a valid note against them; for if it was a forgery, or if, by reason of the insanity of Woodward, he was incapable of binding himself by such a note, the note could not, in legal contemplation, be called a note against him; it was, so far as he was concerned, mere waste paper. The jury having found that Woodward was not liable on the note, by reason of his insanity at the time his signature was

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placed there, we think the defendant must be held liable for a breach of his express warranty.

It is also objected, that the rule of damages adopted by the court was incorrect; and this objection, we think must prevail. The rule of damages, in the ordinary case of a warranty of the quality of goods, is understood to be the difference between the value of the goods, as they should have been by the warranty, and their actual value. In *Coolidge v. Brigham*, 1 Metc. 547, where a note was executed by the maker and the indorsements were forged, and the note had not been returned to the defendant, the court say, that the rule of damages, in an action on the warranty of the note, would be the difference between the amount of the note and its actual value. In this case the jury were instructed, that, if they found for the plaintiff, he would be entitled to recover the amount of the note and interest. It does not appear from the bill of exceptions, that the note, which is still retained by the plaintiff, was shown to be worthless; and as, for any thing that has been made to appear, the note is valid against Philips, it cannot be taken to be of no value. Whatever its value is against Philips, the plaintiff cannot be said to have lost by the breach of the warranty, and he should not recover it of the defendant. The verdict should, at least, have been lessened by that amount. Whether it could have been farther lessened, by showing that the note, if it had been valid against Woodward, would have been worth less than the amount of it, is unnecessary to be decided, that question not having arisen in the case.

The judgment of the county court is set aside and a new trial granted.

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TOWN OF CASTLETON *v.* MARCUS G. LANGDON.

A conveyance of land to a town, for the purpose, as expressed, of having a school house erected and a school taught thereon for the benefit of the youth of the town, for a term specified, of itself imports, in its object, a sufficient consideration to support the conveyance.

An action of trespass *quare clausum fregit*, for encroachments upon land so conveyed, may be maintained in the name of the town.

If the town, in such case, comply with the implied conditions of the grant, by erecting upon the land a school house in which a school should be kept for a reasonable proportion of the time, they will not forfeit the land, nor any part of it, although they should use that portion of it, not wanted for the accommodation of the school house and necessary out buildings, for purposes not connected with the main object in view,—as if they should lease it for purposes of cultivation, or building for a fire engine, or hayscales, should be put upon it, or it should be used by an adjacent land owner as a passage way, or it should be used by those attending meeting at an adjacent meeting house for the purpose of accommodating their teams, or a corner of a meeting house were allowed to rest upon it, without dissent, or a room, in the same building occupied as a school house, should be finished and used by the town for the purpose of holding town and other public meetings.

Neither would the town, in such case, forfeit the land, by allowing the building standing thereon to be used for a number of years as an Academy, or county grammar school, under a charter from the state locating the school at that particular spot.

Such conveyances are always construed liberally, in support of the object contemplated.

Although the county court may have submitted to the jury the determination of that which is properly a question of law, yet if the finding of the jury is in accordance with the views of this court as to the law, the verdict will not be disturbed.

TRESPASS *quare clausum fregit*. The premises were described in the declaration as an acre of land in the village in Castleton, with a town house standing thereon; and the plaintiffs alleged, that the defendant entered upon the land and placed obstructions upon and around it, and broke and entered the town house, and hindered and obstructed the plaintiffs in the use of it. Plea, the general issue,

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and trial by jury, April Term, 1846,—A. L. BROWN, assistant judge of Rutland county court, presiding.

On trial the plaintiff gave evidence tending to prove the commission of the alleged acts of trespass by the defendant; and also gave evidence tending to prove the following facts.

On the twenty seventh day of March, 1786, Samuel Moulton conveyed by deed the premises in question to the inhabitants of the town of Castleton, for the consideration, as expressed, of love and good will, for the term of five hundred years, "to erect, build and set up a school house and to improve said land for the benevolent purpose of teaching and instructing a school on said land,"—and with this clause,—“upon which lot of land the said lessees propose to build a school house, and to improve for the purpose aforesaid, and for no other purpose.” Shortly after the execution of this deed the plaintiffs entered into the possession of the premises and erected thereon a school house, having a swing partition, so that it could be occupied for holding religious meetings and town meetings; and it was so occupied during the life of the lessor; and it appeared that he assisted in erecting the house. In 1787, which was the year succeeding the erection of this house, the representative from Castleton, in the legislature of the state, procured the Rutland County Grammar School to be located upon this lot of land by its charter of incorporation,—the charter containing a provision, that the county of Rutland should not be at any cost or charge in completing or repairing the house. The meeting house in Castleton was built in 1790, and subsequently town and religious meetings ceased to be held in the school house. The school house was burned in December, 1790; and Moulton died in February, 1791. Subsequently another school house was built upon the same land. In 1805 an act of the legislature was passed, “confirming a Grammar School in the county of Rutland,” and locating it at this house, so long as the inhabitants of Castleton should keep the same, or any other house at the same place, in good repair, for the purpose of accommodating such school, to the acceptance of the county court for such county. This school was organized and a building was erected for it upon these premises, and the school continued to be taught there until about the year 1836, when it was removed to another building, not standing on this land. In March, 1836, the town voted to finish a

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portion of the building, which had been occupied by the grammar school, for a town room; and the first floor was finished, and was occupied by the town, until the commencement of this suit, and for the purposes of town and village convenience generally, for lectures, singing-schools, political meetings and exhibitions of science and art; and the second floor was occupied for a school room.

It farther appeared, that some hay scales were erected upon the land in question, eight or ten years previous to the commencement of this action, but without any authority from the town, and were removed after remaining there a few years. A building for a fire engine was also erected upon the premises, but without authority from the town, and remained there at the time of the commission, by the defendant, of the acts complained of by the plaintiffs. The town also leased a part of the land for the purpose of cultivation, and the rent, with the exception of one year, was paid into the town treasury for the use of schools;—and that one year the rent was paid into the town treasury without the particular purpose being designated, for which it was to be used; although, after the same had been paid in, it appeared that one of the selectmen ordered it to be treated as paid in for the use of schools. No evidence was offered, to show that any part of the money so paid in had been, in fact, expended for the use of schools. For a number of years Dr. Theodore Woodward used a portion of these premises for a passage way to and from his buildings. One corner (about eleven inches) of the Methodist meeting house was erected on this land; and the town took no steps to cause this to be removed. A portion of this land, also, was used by the congregation attending at this meeting house, for the purpose of fastening their horses and placing their carriages;—it did not appear, that the town had ever received any compensation for such use of the premises, or for the infringement upon the premises by the erection of the meeting house.

It appeared, that the wife of the defendant was the grand-daughter of Samuel Moulton, the grantor, and that her father, who was the son of Samuel Moulton, had deceased previous to the commission, by the defendant, of the acts complained of by the plaintiffs.

The defendant requested the court to charge the jury, that the plaintiffs derived no title to the land in question, except from the lease of Samuel Moulton; that what was the nature and extent of

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that title must be ascertained from a legal construction of that instrument; that the lease only gave the inhabitants of the town of Castleton the right to erect a school house upon the land, and to improve the land for the benevolent purpose of teaching and instructing a school upon the land, and for no other purpose; that if the town used the land, or allowed it to be used, for any other purpose, it worked a forfeiture of the grant; that the land was not given as a school fund, but as a school house site, or location, and if used by the town, or allowed to be used, for any other purpose, it would work a forfeiture of the grant, even though the rents were applied for the use and support of schools; that the various uses of the land before mentioned, as for the location of hay scales and an engine house, the use of it for a passage way by Dr. Woodward, the use of it by the Methodist congregation, the location of part of the Methodist meeting house upon it, and the proceedings of the town in March, 1836, and subsequent thereto, as proved, were, as matter of law, inconsistent with the terms of the lease and worked a forfeiture; and that this suit could not, in any event, be maintained in the name of the town of Castleton. The defendant also requested the court to decide, as matter of law, what acts and uses were inconsistent with the purposes of this grant, and to instruct the jury, that, if they found such acts, or uses to be proved, there was a forfeiture of the grant.

But the court declined so to charge; but did instruct the jury, that the suit could be maintained by the town of Castleton; that if the jury should find, that the acts of the town, and the uses to which they put the land, were inconsistent with the provisions of the lease, there was a forfeiture, and their verdict should be for the defendant, otherwise for the plaintiffs; that the lease should be construed liberally for the plaintiffs; and that, if the plaintiffs had leased portions of the premises for other purposes than the use and support of schools, but the rent received therefor had been applied for that use, it would not work a forfeiture of the grant.

The jury returned a verdict for the plaintiffs. Exceptions by defendant.

Pierpoint and Ormsbee & Edgerton for defendant,
The language used in the lease shows a clear and explicit inten-

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tion on the part of the donor, to give permission to improve the land for the purpose of a school house, and for no other purpose. We do not contend, that, because the lessees may have used the building erected for a school house for a mere temporary purpose, not inconsistent with its primary use, such occupancy would work a forfeiture; but whenever they do permanently appropriate the land to any other purpose, even though they appropriate the proceeds to the use and support of schools, they are without the condition imposed by the donee, and their use, right and privilege ceases. The charge of the court was clearly erroneous, in informing the jury, that if the plaintiffs had leased a portion of the premises for purposes other than the support of schools, it would not work a forfeiture of the lease; and also, in not instructing the jury what acts, in law, and as matter of law, were inconsistent with the rights of the plaintiffs under the lease; and in holding that the town of Castleton could maintain this action.

Briggs & Williams and I. T. Wright for plaintiffs.

The town of Castleton became possessed, under the lease, of an estate for years in the premises. The lease was founded upon a sufficient consideration, and was made to a sufficient lessee; *Inh. of Worcester v. Eaton*, 13 Mass. 371; it was accepted by the town, and the premises were appropriated to the use specified, and the use has been kept up to the present time.

There was, and could have been, no forfeiture of the rights which the plaintiffs obtained under the lease. A school has always been kept on the place, and still is. None of the acts complained of amount to a misuse, even; for the town are not liable for and cannot be prejudiced by the unauthorized acts of others by their intrusions. The avails of that portion, which could not be used for a school house, were appropriated for schools in town generally. The permitting town or religious meetings to be held upon the premises was no interference with the use designated in the lease. *Jackson v. Pike*, 9 Cow. 69. The estate granted by the lease was not conditional; it was a grant of land to be used for a particular purpose; and even if there had been a misuse, the estate, or interest, in the town, or public, would not have been thereby forfeited, but recourse should have been had to chancery,—which would have compelled

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the grantees, or their agents, to have appropriated the premises to their proper use. The lease reserves no rights of re-entry for the non-performance of any trust; and no condition is to be construed to defeat an estate, unless it be introduced by formal and technical words, as *sub conditione, &c.*, unless there be an express provision for re-entry. Co. Lit. 328-9. Bac. Abr., Condition A. No case can be found, where an estate like this has been adjudged forfeited. 2 Bl. Com. 268. If these acts would work thus, it was waived by the grantor's aiding in erecting the first school house for a common school, and for town and religious purposes; and these acts made a dedication by Moulton, aside from the lease.

The opinion of the court was delivered by

DAVIS, J. This case was before this court at the last term, on exceptions taken by the plaintiffs to the ruling of the county court at a previous term, when the judgment of the latter court, which was for the defendant, was reversed, and a new trial granted. The judge, who delivered the opinion of the court on that occasion, (REDFIELD, J.,) not being now present, and the case not being reported, I am but imperfectly acquainted with the points then raised and decided, and not at all with the reasoning employed to elucidate them.

It is quite unnecessary to spend any time upon some of the points now raised in the argument,—particularly that in relation to the right of the town to bring the action, and that in support of the request of counsel to instruct the jury what particular acts, or omissions, on the part of the lessees would work a forfeiture of the lease at law. The only questions of importance, which the case presents, respect the proper construction of the instrument of conveyance, under which the plaintiffs claim, and the charge of the court to the jury.

The defendant's counsel have not suggested any doubt of the validity of the conveyance from Samuel Moulton to the town, on account of want of adequate consideration, nor on any other account. That a legal consideration was necessary to uphold this conveyance, I have no doubt; and that the love and good-will borne by the lessor to the inhabitants of the town, expressed as the consideration for the

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conveyance in the lease itself, was inadequate for that purpose, I have as little doubt.

It is an innovation upon the principles of the common law to require a consideration to sustain a deed of bargain and sale, or other instrument under seal, introduced probably from the courts of equity; but, though resisted strenuously, as many other salutary principles, having the same origin were, it has long since become firmly established in England. The same doctrine is incorporated into the law in several, if not all, of the American states, our own included. *Jackson ex d. Hudson v. Alexander et al.* 3 Johns. 484; *Fisher v. Smith*, Moore 378, 569; *Mildnays Case*, 1 Coke 175; *Jackson ex d. Allen v. Florence*, 16 Johns. 47; *Jackson v. Deloney*, 4 Cow. 430; *Jackson v. Pike*, 9 Cow. 69; *Stevens, Adm'r v. Griffith et al.*, 3 Vt. 448; *Wood v. Beach et al.*, 7 Vt. 522. In this state a consideration, though not stated in the deed, may be shown by parol. *Stevens v. Wond.*

Notwithstanding the general doctrine of the necessity of a consideration seems firmly established, it is very apparent, from numerous cases on the subject, that the courts are satisfied with any amount of consideration, however small, and almost any statement of it, however general. Although love and good will, in this connection, are of no validity, and although the case does not shew that any evidence of a direct pecuniary consideration was introduced, yet we recognize in the scope and object of the conveyance, viz. the benevolent purpose of having a school house erected and maintained on the land, in which a school should be kept for the instruction of the youth of the then existing and all future generations, during the term of 500 years, a consideration amply sufficient to support the conveyance. In 9 Cow. 69 a conveyance in fee of two acres to the supervisors, for the purpose of building thereon a court house, as also for increasing the value of adjacent property owned by the grantor, was sustained without any other consideration. Indeed, the court say that the first of these objects was sufficient.

It has been rather intimated, than directly contended in argument, that even though a school house were erected and maintained on the land, any other use of a portion of it, for purposes not connected with the main object in view, would operate as a forfeiture of the whole; or, at any rate, of so much as was so used, even though the

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rents derived from such use were applied to the purposes of education in the town. We cannot sanction either alternative.

That the conveyance must be regarded as subject to a condition, requiring the leasees to erect and maintain a school house, in which a school should be kept a reasonable portion of the time, is undoubtedly true. That being done, the lease must be construed to vest in the lessees the use of the whole acre, for any purposes not inconsistent with the main object of the lease. There was not only no error in the instructions of the county court, which assumed that an appropriation of the rents of such portion for educational purposes would satisfy the requirements of the contract, but the case did not require evidence of such appropriation. There is nothing in the instrument indicating an intention in the lessor, that whatever advantages might, at any time, incidentally result to the town in the shape of rents, or otherwise, should be treated as trust funds, pledged to the main object. At the time, 1796, the town was new, with few inhabitants, no villages, with few school houses, and but slender opportunities of acquiring the advantages of even a common school education, while on the other hand land was plenty and of little value. The whole acre was not required for the erection of a school house. A wood shed, yard and necessary appurtenant out buildings would occupy some additional space. It was natural to set apart some definite quantity and place it under the control of the town, requiring on their part the erection and support of such buildings and appurtenances, as should carry into effect the benevolent objects of the public spirited lessor. Farther than that he evidently did not intend to provide. Such conveyances are always construed liberally, in support of the object.

But it is still insisted, that the town, with all allowable latitude of construction, have failed to satisfy what may be regarded as the just expectations of the donor, and that his heirs, one of whom is the defendant's wife, has the right to resume possession of the premises, in the same manner as their ancestor might have done, if now alive.

Granting the right, in case of forfeiture, for the present purpose, although under our laws this right would seem to belong to the administrator, rather than to the heir, we are all satisfied, that the facts disclosed here shew a substantial fulfilment of the conditions and limitations, on which the conveyance was received. The house was built during the life of Mr. Moulton, in such a form as to subserve

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other public purposes, than that of maintaining a school; and this, so far as appears, without objection on his part. In fact, he must be taken to have assented, as he assisted in the erection of it. About the time of his death the house was destroyed by fire, and a new one erected, on a different plan; as, in consequence of the erection of a meeting-house, there was no longer occasion for holding religious meetings, or town meetings, in the school house.

It has not been seriously contended, that the use of the new house for a grammar school, or academy, under a charter from the legislature, as a county school, for a number of years, should be considered as a perversion of the premises to a purpose foreign to that contemplated. Such an institution may probably not have been within the contemplation of the lessor, at the time of the lease; yet as the charter for it was obtained the next year, and by the exertions of the representative of the town, and this, so far as appears, without opposition from him; and above all, when we consider that at least it equally answered the purpose of imparting to the youth of the town of both sexes useful instruction, we have no hesitation in saying we find here no misappropriation of the property.

As already intimated, the defendant was not entitled to such instructions as he requested in relation to the placing of hay scales, a fire engine house, and some other small encroachments, on a portion of the land, whether with, or without, the consent of the town. These various uses were in no way inconsistent with the object of the lease, and afford no justification for the intrusion by the defendant upon the possession of the plaintiffs.

There is one part of the charge, which, though not subject to just exception on the part of the defendant, as operating a prejudice to him, was nevertheless novel and liable to formal objection. I mean that part of it, which referred it to the jury, to say whether the several acts and uses complained of were inconsistent with the lease, or not. This was rather matter of law, which it was the province of the court to determine. Under proper instructions the jury were to find whether a forfeiture occurred, or not, or, in other words, whether the defendant was guilty, or not. Without the requisite instructions they have found the issue in accordance with the views of this court as to the law of the case. There is, then, no occasion to disturb the verdict.

The judgment of the county court is affirmed.

Mason v. Cannon et al.

FRANCIS SLASON v. CANNON & WARREN.

The supreme court of this state is not denominated a court of chancery, but is an appellate court from the final decrees, and those only, of the court of chancery; and its powers are limited to the correction of errors found in such decrees.

After a case has been heard and decided in the supreme court upon an appeal from the court of chancery, the supreme court have no power to sustain, or allow, a bill of review. The power in relation to such bills must be exercised by the court of chancery.

There is nothing in chapter thirty-three of the Revised Statutes, in reference to "New Trials," which confers upon the supreme court power to grant a re-hearing in a case decided on appeal from the court of chancery.

Quere, Whether the court of chancery can sustain a bill of review, pending an appeal of the case to the supreme court. If not, the want of remedy, in case of new evidence being discovered between the time of the hearing before the chancellor and the subsequent determination in this court, is a defect in the law, which can only be supplied by legislation.

THIS was a petition for a new trial and for leave to file a bill of review in a case heard in this court at the February Term, 1842, on appeal from the court of chancery; in which case Cannon & Warren were complainants and this petitioner and one Norton were defendants.* The principal ground of the present application was the alleged discovery of new evidence, a portion of which was stated to have been discovered between the time of the hearing before the chancellor and of the decision on the appeal in this court.

After argument by *E. L. Ormsbee* and *E. Edgerton* for the petitioner, and by *R. R. Thrall* and *A. Pond* for the petitionees, the opinion of the court was delivered by

HALL, J. The first inquiry in this case is, whether the application for relief is properly made to this court. Our present chancery system is of recent origin, and I am not aware that the question now presented has been settled by the adjudication of this court. It is to be determined by the construction of the Revised Statutes.

By the Revised Statutes, chapter 24, a court of chancery is con-

*Cannon et al. v. Norton et al., 14 Vt. 178.

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stituted, consisting of the several judges of the supreme court, who are made chancellors in their respective circuits; and the court of chancery, thus constituted, is invested "with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state." Sec. 1, 2, 23. The supreme court is not denominated a court of chancery, but is an appellate court from the final decrees, and those only, of the court of chancery; and its powers are limited to the correction of errors found in such decrees. Upon the hearing of the case here, this court does not, as in cases arising at law, render such judgment as the court below ought to have rendered, and enforce it by process upon the parties. But the finding of this court, whatever it may be, is remitted to the court of chancery, that such proceedings may be had there, as may be necessary to carry the finding of this court into effect. Sect. 21. The powers of this court are somewhat analogous to those of the House of Lords in England.

In England there are two modes of bringing the subject of a decree to the reconsideration of the court of chancery. The first is by a petition for a *rehearing*; which is not allowed after the decree has been enrolled, but may be brought at any time before enrolment,—there being no other limitation of time in regard to this remedy. In this state the judges of the supreme court, in execution of the powers conferred on them to establish rules of practice in the court of chancery, have, by their twenty-fourth Rule, provided, that decrees shall not be recorded until the expiration of twenty days after the rising of the court of chancery; within which time, and not after, petitions for a rehearing may be brought, under certain regulations prescribed by the rule.

The other mode of reviewing a decree in England is by *bill of review*, which is granted upon petition for that purpose to the chancellor, after the enrolment of the decree, and such petition may be brought at any time within twenty years; although, after long acquiescence in a decree, such applications are not looked upon with favor. The bill of review may be founded upon newly discovered facts; and when thus founded, it would seem that it may be brought as well after, as before, the affirmance of the original decree in parliament. 3 Daniel's Ch. Pract. 1733. Story's Eq. Pl. sect. 418,

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These proceedings for a review are all before the chancellor, and never before the appellate court.

Nothing is found in our chancery acts, manifesting an intention in the legislature to withhold from the court of chancery in this state the jurisdiction, exercised in England by the chancellor over bills of review. On the contrary, the twenty second section of the statute, by prescribing a limitation to the exercise of jurisdiction in that respect, is a clear indication, that the jurisdiction, subject to such limitation, was designed to be retained. This section contemplates, that the power, in relation to bills of review, may be exercised by the court of chancery, after a determination of the cause in the supreme court; and as nothing is found in the statute conferring this power on the appellate court, the court of chancery necessarily to follow, that the appellate court cannot exercise the power. It is neither derived from the chancery jurisdiction in England, nor from the statute conferring chancery powers.

It is however claimed, that the petition in this case may be sustained, as a *petition for a new trial*, under the provisions of chapter thirty three of the Revised Statutes. The incongruity of conferring chancery jurisdiction in a different chapter of the statutes, from that in which the whole subject of chancery jurisdiction is professedly treated, is manifest. That consideration, alone, would induce us to require the use of clear and explicit language in conferring farther jurisdiction, in another chapter. We have been unable to find, in the chapter upon new trials, any such clear and explicit language, manifesting such intention.

The term *new trial*, itself, is entirely out of place in, if not wholly unknown to, chancery proceedings. By the first section of the chapter, new trials are to be granted "agreeably to the usages of law," and there is no reference to the practice or usages in equity. The new trials, by both the first and second sections of the statute, are to be sought within certain periods after "*the judgments were rendered;*" nothing being said of *decrees made*,—by which word determinations in chancery are properly designated. New trials are to be granted in causes determined by the county court; but no mention is made of cases determined in the court of chancery. The language of the chapter, though pertinent and applicable to

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trials at law, is quite inappropriate and out of place, when sought to be applied to proceedings in equity.

It is urged in this case, that, as the twenty second section of the chancery act prohibits the sustaining of a bill of review by the court of chancery, after the determination of the case in this court on appeal, for any cause which originated before the determination in this court, there would be no remedy for the party, where new evidence was discovered between the time of the hearing before the chancellor and the subsequent determination in this court; and that, to prevent a failure of justice, this petition for a new trial ought to be sustained.

If the court of chancery could not sustain a bill of review, pending on appeal in this court, upon which no opinion is intended to be expressed, there would, indeed, seem to be a time, within which the discovery of new evidence could not be rendered available to the party. If the language of the statute in relation to the jurisdiction of this court were in any way doubtful, this consideration might be entitled to weight, in construing it. But even if it were admitted, that a bill of review could not be sustained, pending an appeal to this court, we should be disposed to consider the want of a remedy in such a case as a defect in the law, to be supplied by future legislation, rather than to assume a jurisdiction, which we are satisfied it was not the intention of the legislature to confer.

Without inquiring into the particular facts, upon which the application is founded, we are satisfied, that it must be dismissed, and with costs to the petitionees.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON.

FEBRUARY TERM, 1847.

PRESIDENT,

Hon. ISAAC F. REDFIELD,
Hon. DANIEL KELLOGG, }
Hon. HILAND HALL, } ASSISTANT JUDGES.
Hon. CHARLES DAVIS.

REUBEN WHITMAN v. TOWN OF POWNAL.

The term "*land*," as used in the exception to the statute giving jurisdiction to justices of the peace, is sufficiently comprehensive to include a right of way over the real estate of another, whether held by the public, or an individual.

But a justice of the peace is not excluded from taking jurisdiction of an action, merely because, under the plea of the general issue, or a plea in bar, the title of land may be drawn into controversy,—but only when the action necessarily involves such an inquiry, as ejectment, and other real actions, or when, by the course of pleading, the title to land is actually contested.

A justice of the peace has jurisdiction of an action of trespass on the case, brought against a town to recover for injuries alleged to have been sus-

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tained by reason of the insufficiency of a highway which the town were bound to maintain, where the damages claimed are less than one hundred dollars, unless the defendants interpose such a plea, as directly puts in issue the right of way.

TRESPASS ON THE CASE. The plaintiff alleged, in his declaration, that his loaded wagon was overturned by reason of the insufficiency of a highway, which the defendants were bound to repair, and that he thereby suffered damage to the amount of seventy five dollars. The action was commenced before a justice of the peace; and, at the return day of the writ, the defendants moved to dismiss the action, for the alleged reason, that the cause of action set forth in the declaration involved the title to land, and therefore a justice of the peace had not jurisdiction thereof. The motion was overruled, and judgment was rendered in favor of the plaintiff, and the defendants appealed. At the term of the county court, at which the appeal was entered, the defendants renewed their motion to dismiss.

The county court, June Term, 1845,—WILLIAMS, Ch. J., presiding,—dismissed the action for the cause assigned. Exceptions by plaintiff.

A. P. Lyman for plaintiff.

I. A practical construction has been given to the statute by long and uniform usage, sustaining the jurisdiction of justices of the peace in actions like the present. *Boyden v. Brookline*, 8 Vt. 284. *State Treasurer v. Kelsey*, 4 Vt. 388. *Schoff v. Bloomfield*, 8 Vt. 472. One case, at least,—*Yuran v. Randolph*, 6 Vt. 369,—commenced before a justice, has passed to the supreme court upon exceptions, without any question being raised as to the jurisdiction. And it will be found, that the precise words used in the Revised Statutes, excluding the jurisdiction of a justice, viz. “*and where the title of land is concerned*,” have been used in all the statutes enacted upon the subject, since 1787. *Hasw. St.* Slade’s St. 124, 137, 139. *Rev. St.* 170, § 7.

II. The subject of the present suit is not *land*, within the meaning of the statute, but a mere *franchise*, or *easement*. The term “*land*,” at common law, includes the ground, or soil, and not a right of way, or other easement,—those being called incorporeal hereditaments; 1 Co. Lit. 4 a; 2 Bl. Com. 16, 17, 35; 1 Sw. Dig.

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106; Rob. on Frauds 106; and in the construction of a statute words are to be understood in their common law sense; 1 Sw. Dig. 11; 6 Bac. Abr. 383. This distinction has been recognized in Connecticut; *Palmer v. Palmer*, 6 Conn. 409; and has also been impliedly recognized in the statutes of this state; Slade's St. 84, 290; *Judd v. Leonard*, 1 D. Ch. 204; *Mitchell v. Walker*, 2 Aik. 266. And it has been held, that an action like the present did not affect the title to land, so as to render it local. *Hunt v. Pownal*, 9 Vt. 411.

III. But the title even of the easement is not concerned in this suit, within the meaning of the statute,—the question in regard to the right arising only incidentally, and not being the foundation of the action. *Noyes v. Chapin*, 6 Wend. 461.

Kellogg and Isham for defendants.

If the construction, given by the Revised Statutes, c. 4, § 8, to the word *land*, is applied to sect. 7 of the statute relating to justices of the peace, it excludes from a justice's jurisdiction all actions, wherein the title of lands, tenements, or hereditaments, is concerned, or any right thereto, or interest therein. In the present action it would be necessary for the plaintiff to prove, and for the court to determine, that the *locus in quo* was a highway, which the defendants were bound to keep in repair, and that the injury was occasioned by reason of the insufficiency, or want of repair, of such highway; Rev. St. 139, § 26; and this is directly controverted by the plea of the general issue. In *Heaton v. Ferris*, 1 Johns. 146, the defendant pleaded in bar, in an action of trespass, a right of way over the *locus in quo*; and it was held, that this concerned the title. We think it equally clear, that declaring upon a right of way, as the foundation of the action, would involve, or concern, the title to the land covered by such highway, under our statute. So in *Spear v. Bicknell*, 5 Mass. 125, which was trespass, the defendant pleaded in bar, that the *locus in quo* was part of a highway; and it was held, that by this plea the title to real estate was put in issue. *Dunton v. Mead*, 6 Conn. 418, is to the same effect. It is true these were actions of trespass; but we suppose the form of action is immaterial, as there are many actions, other than real, or mixed, in which the title to land is, or may be, concerned,—as has been decided by this court in

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Whitney v. Bowen et al., 11 Vt. 250; *Hastings v. Webber*, 2 Vt. 407. The defendants, in the present case, claim the land, covered by this supposed highway, free from any such right, real franchise, or easement, as is claimed by the plaintiff,—which directly affects the title of the land, and puts in issue the existence of this right, which is claimed by the plaintiff for himself and the public, and which he must establish, to sustain his action.

The opinion of the court was delivered by

DAVIS, J. The only question in this case is whether a justice of the peace had jurisdiction of the action.

The action was to recover damages occasioned by the overturning of the plaintiff's loaded wagon, owing to the insufficiency and want of repair of a certain highway, which it was alleged the defendants were bound to keep in repair. The damages were claimed to be \$75. By the statute giving justices of the peace jurisdiction, it is provided, that, "with certain specified exceptions, their civil jurisdiction shall extend to all actions, when the debt, or other matter in demand, does not exceed \$100. It is insisted, that this case falls within the exception indicated by the words "*and where the title of land is concerned.*" If so, no action of this description can be brought before a justice, whatever may be the sum demanded in damages.

Is the title of land concerned necessarily in all actions of this kind, irrespective of the line of defence adopted,—or only when some special plea raises the question as to the legal existence of the highway? Or does any controversy on that subject involve a question of title to land, within the meaning of the statute, in whatever form it may be presented.

In the present case the defendants, at the return day of the writ before the justice, filed a written motion to dismiss the action for want of jurisdiction, of the disposition of which I find in the justice's records no other mention, than that, after several continuances, judgment was rendered in favor of the plaintiff for \$25 damages and his cost; from which judgment the defendants appealed to the county court; in which court the same motion was renewed, and prevailed, and the action was dismissed. No pleadings, not even the

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general issue, have been filed. The question is to be determined, then, from a consideration of the nature of the action, as it appears from the declaration itself. The term *land* is comprehensive enough to include a right of way over the real estate of another, whether held by the public or an individual. Indeed, the statute in relation to the construction of statutes extends the term, so as to include tenements and hereditaments and all rights thereto and interests therein. Rev. St. chap. 4, sec. 8. Still, the meaning in any given case must be determined upon ordinary principles of construction.

In the case of *Whitney v. Bowen et al.*, 11 Vt. 250, it was decided, that an action on the case for a nuisance, in erecting a board fence so near the dwelling house of the plaintiff as to obstruct his lights, when a plea to the jurisdiction was interposed, alleging title in the defendant to the land on which the fence was erected, could not be sustained before a justice; and the judge, who delivered the opinion of the court, intimates, that many cases may arise in other than real or mixed actions, which would be governed by the same considerations,—particularly specifying the action of covenant broken on a deed of conveyance, and an action on the case against a sheriff for a defective levy of execution on real estate. The case of *Hastings v. Webber*, 2 Vt. 407, is an instance of the former kind. The covenant alledged to have been broken was the covenant against incumbrances. In the assignment of breaches it is not distinctly stated what incumbrances existed. In *Pritchard v. Atkinson*, 4 N. H. 291, occurs a case of a similar character; and here the breach assigned was the existence of a highway;—it was decided, that a justice had no jurisdiction. In *Spear v. Bicknell*, 5 Mass. 125, which was an action of *trespass quare clausum fregit*, originally brought before a justice, the defendant pleaded, that the *locus in quo* was a public highway, and that, finding a gate upon it, he opened it and left it open, which was the trespass, &c. It was determined, that this was setting up a title to real estate, within the contemplation of their statute, which requires the justice, whenever the defendant sets up a title in real estate in himself, or another, to proceed no farther with the trial of the case, but to recognize the defendant to the plaintiff to enter and prosecute his defence at the court of common pleas. There, as here, justices are not necessarily excluded from

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taking cognisance of actions of that kind, because they do not, as a matter of course, involve a question of title to land.

In Connecticut a different view of the subject is taken. In *Palmer v. Palmer*, 6 Conn. 409, which was case for the obstruction of a way, where the defendant pleaded title to the *locus in quo* in himself, Ch. J. Hosmer, in delivering the opinion of the supreme court of errors, said, that the title of land was not in question, but that it was a controversy respecting a franchise only. The general provision of the statute of that state, prohibiting justices from trying cases where the title of land is concerned, is very similar to our own statute. In *Dunton v. Mead*, 6 Conn. 418, where, to an action of trespass *quare clausum fregit* the defendant pleaded a right of way over the premises, it was determined, that the title of land was drawn in question. These two cases seem to me to be irreconcilable. In both a right of way was involved,—in the former by the allegations of the plaintiff, in the latter by those of the defendant. It is true, they were decided under different statute provisions, the latter having reference, not to a justice's jurisdiction, but to the right of appeal from the county to the supreme court. I do not perceive, however, that the phraseology of the two statutes varies so essentially, as to justify the diversity of views exhibited in the two cases.

It has been decided in New York, *Heaton v. Ferris et al.*, 1 Johns. 146, that where, to an action for breaking and entering the plaintiff's close, the defendant pleaded in bar a right to a common highway, and also to a private way, this brought in question the freehold, or title of land, mentioned in the plaintiff's declaration, so as to entitle the plaintiff to full costs, though the verdict was for less than five dollars.

As a question of mere authority, it is, then, not free from doubt; but it is undoubtedly true, that the scales preponderate in favor of the position, that a right of way, public, or private, may be considered as land, in that particular aspect in which it is presented here.

How far, then, is that question involved in the present case? On a general denial of the declaration it is incumbent on the plaintiff to prove the existence of the highway, and the obligation of the town to keep it in repair. So far, although there is no antagonistic contro-

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versy, directly between the parties, in respect to a claim of title in either, yet the title in a third party, the public, may be said to be concerned. Perhaps a just construction of the statute would comprehend the latter case, as well as the former. Yet another important inquiry still remains,—is a justice's jurisdiction excluded in those actions, where, under the plea of the general issue, or a special plea, the title to land *may* be drawn into controversy, or only when, by the course of pleading, it is actually contested.

Should the defendant, instead of pleading the general issue in a case of this sort, plead in bar, that the injury complained of was the result of the plaintiff's misconduct, or want of caution, or should the defendant admit the facts set forth in the declaration to be true, yet insist that they presented no legal ground of recovery,—and this may be a proper course, though formal pleadings are seldom adopted before a justice,—can it be said, that, in these cases, within the meaning of our statute, the title of land is concerned? We think not. The language of the statute does not reach any particular form of action; it does not rest the exclusion of jurisdiction upon any abstract possibility of the occurrence of a question of title; but it is made to depend upon the fact, whether, without reference to the nature of the action, it is actually in controversy. We think this is the proper construction of the statute. Whatever actions *necessarily* involve such an inquiry, as ejectment, and other real actions, and as, perhaps, do also the two adverted to by BENNETT, J., in the case of *Whitney v. Bowen*, these, of course, fall within the exception in the statute. It is not pretended, that the present action is one of that description. It is left, then, to be determined by the pleadings subsequent to the declaration, whether it comes within the statute. As already stated, no such pleadings have been interposed in the present case; and consequently we cannot say any right of way, even, was concerned. On another ground we were all inclined to think the action should not have been dismissed; and that is, that similar language in the previous statutes, as far back as 1787, has received a practical construction, universally, it is believed, acquiesced in by courts and the bar, in accordance with the views above indicated. Actions of this kind have been frequently brought before justices of the peace in different parts of the state, without question; and in one

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case, at least, such an action came into this court, which was originally commenced before a justice. No question was there raised as to jurisdiction. *Yuran v. Randolph*, 6 Vt. 369.

Were we satisfied, which we are not, that this general practical construction was erroneous, we should be with difficulty induced to overturn it, in a question involving no important principles.

The result is, the judgment of the county court is reversed, and the case is remanded for farther proceedings in that court.

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PIERPOINT ISHAM, Administrator of FRANCIS DEPEAU, v. THE BENNINGTON IRON COMPANY, CHARLES H. HAMMOND, NATHAN LEAVENWORTH, DUNCAN P. CAMPBELL, JOHN V. FASSETT, DANIEL ROBINSON, LE ROY MOWREY, WILLIAM NOYES, BILLINGS P. LEARNED, EBENEZER PROUDFIT, JACOB L. VAN SCHOONHOVEN, WILLIAM H. WARREN, ISAAC B. HART, GEORGE LESLEY, DAVID T. VAIL, JOEL MALLORY, EZRA T. DOUGHTY, BENJAMIN HATCH, JOSEPH M. WARREN, STEPHEN PRATT, AUSTIN HARMON AND BENJAMIN F. FAY.

[IN CHANCERY.]

The registry of a defective deed is no notice of title to any one.

To entitle a deed to registration, it must be executed according to the *statute* requisites, by which the registry of deeds is established;—it is not sufficient, that it is executed merely according to the requirements of the common law.

All statutes, in regard to the same subject matter, are to be construed together, as parts of one system.

Later and more specific statutes, as a general rule, supersede former and more general statutes, so far as the new and more specific provisions go;

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The statute of Nov. 3, 1815, which provided that private corporations might, by their vote, authorize their president to convey real estate belonging to them, and that the deed of such president, reciting the vote of the corporation thereunto authorizing him, and being duly executed, acknowledged and recorded, should be sufficient to pass the title, was designed to and did, so far as corporations were concerned, supersede the statute of March 6, 1797, in reference to conveyances of real estate; and the mode mentioned in the statute of 1815 was intended to be the *uniform* and the *only* mode of conveying land by corporations. DAVIS, J., dissenting.

The essence of the requisition of the statute of 1815 is, that the deed must be executed in pursuance of *some vote of the corporation*, and that this vote must be recited in the deed.

But, even under the statute of 1797, where a deed, which professed to be the deed of a corporation, was signed by a person, who described himself, in his signature, as "chairman" of the corporation, and no vote, authorizing him to sign the deed, was recited, and the records of the corporation showed no such vote, it was held, that no sufficient evidence of the consent of the corporation to the deed was shown, notwithstanding all the individual corporators were parties to the deed, and executed it, for the purpose of conveying, by the same deed, all the shares in the capital stock of the corporation;—and it is not sufficient, that the corporators *now* say they consented to the execution of the deed by the chairman, on behalf of the corporation.

So, under that provision of the statute of 1797, which required that deeds of land should be "*signed and sealed*," it was held that a deed, purporting to be the deed of a private corporation, called "The Bennington Iron Company," and which was signed "Charles H. Hammond, Chairman Bennington Iron Co.," was not sufficiently *signed*, to render it a valid deed. It was necessary, under that statute, that the *name* of the grantor should be *subscribed* to the deed, in order to designate it as his deed.

And it is not sufficient, to supply this defect, that the deed is sealed with the corporation seal. *Sealing*, in case of a corporation, does not import *signing*, nor obviate the necessity of having the *name* of the corporation *subscribed* to the deed.

And where such deed was signed by one as "chairman" of the corporation, and he affixed to the deed the corporation seal, and there was also annexed to the deed a certificate of the oath of the chairman, that the seal so affixed was the seal of the corporation, and that it was affixed by their authority, it was held, that this was no sufficient *acknowledgment*, under the statute of 1797.

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APPEAL from the court of chancery. This was a bill of foreclosure, and the orator's claim was founded upon a tripartite indenture of bargain and sale, between The Bennington Iron Company, of the first part, the defendants Hammond, Leavenworth and Campbell, of the second part, and the orator's intestate, of the third part, purporting to be executed for the purpose of securing a debt due from the corporation to the intestate of twenty thousand dollars, and to bear date May 12, 1827. The bill was taken as confessed as to the corporation. The defendant Hammond answered, admitting, in substance, the allegations in the bill. It appeared, that the other defendants, except Leavenworth and Campbell, had either purchased from the corporation, for valuable consideration, subsequent to the date of the indenture relied upon by the orator, some portion of the real estate described in the indenture, and had caused their deeds to be duly recorded, or that they were creditors of the corporation, and had attached the real estate described in the indenture, subsequent to its date, as the property of the corporation, and had perfected their liens by judgment, execution and levy ;—and these defendants answered, setting forth their respective titles, and insisting, that the indenture relied upon by the orator was not duly executed as the deed of the corporation, nor as the deed of Charles H. Hammond, chairman of the corporation, and that it was wholly inoperative and void, as a mortgage, as against these defendants. These answers were traversed, and testimony was taken upon both sides.

Those parts of the indenture relied upon by the orator, and the certificates appended thereto, which need be recited, were as follows ;—

"This Indenture, made the 12th day of May, A. D. 1827, between 'The Bennington Iron Company, of the first part, Charles Henry 'Hammond, of Bennington in the county of Bennington and State 'of Vermont, Nathan Leavenworth, of the same place, and Duncan 'P. Campbell, of the city of New York in the State of New York, 'of the second part, and Francis Depeau, of the said city of New 'York, of the third part : Whereas the said parties of the first part, 'by a certain act of legislature of the state of Vermont, passed on 'the 14th day of November, A. D. 1826, are duly constituted a body 'politic and corporate, as by reference thereto may fully appear ; 'and whereas the said parties of the second part are the only stock- 'holders and solely interested in the capital stock of the said parties 'of the first part ; and whereas the said parties of the first and second 'parts are justly indebted to the said party of the third part in the

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'sum of twenty thousand dollars, lawful money of the United States of America, secured to be paid by their certain joint and several bond, or obligation, bearing even date with these presents, in the penal sum of forty thousand dollars, lawful money, as aforesaid, conditioned for the payment of the said sum of twenty thousand dollars on the 12th day of May, A. D. 1829, and the lawful interest thereon, to be computed from the day of the date of the said bond, or obligation, and to be paid semi-annually, or half yearly, without any fraud, or other delay,—as by the said bond, or obligation, and the condition thereof, reference being thereunto had, may more fully appear:—Now, therefore, this indenture witnesseth, that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond, or obligation, with interest thereon, according to the true intent and meaning thereof, as also for and in consideration of the sum of one dollar, to them in hand paid, by the said party of the third part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, &c.; (*describing the real estate of the corporation;*) 'And this indenture farther witnesseth, that the said parties of the second part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond, or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid, by the said party of the third part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have severally granted,' &c., 'and by these presents do severally grant,' &c., 'unto the said party of the third part, and to his executors,' &c., 'all and singular the shares of them, the said parties of the second part, and of each of them, and all other their respective rights, titles, interests, claims, property and demand whatsoever, both at law and in equity, of and to the capital stock and other property of the said parties of the first part above mentioned and described. To have and to hold,' &c. 'Provided, nevertheless,' &c. [*being a condition of defeasance, in case of payment of the amount secured by the bond; also covenants, by the parties of the first and second parts, that they would pay that amount, and that they would keep the premises insured*] 'In witness whereof the said parties of the first part have hereto set their seal of incorporation, and the said parties of the second and third parts have hereto set their respective hands and seals interchangeably, the day and year first above written.

Sealed and delivered
in the presence of
Ab'm Ogden, Jr.,
J. S. Huggins,

C. H. HAMMOND,	Chairman	[Seal.]
Bennington Iron Co.		
C. H. HAMMOND,		[Seal.]
N. LEAVENWORTH,		[Seal.]
D. P. CAMPBELL."		[Seal.]

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"City and County of New York. On the 12th day of May, A. D. 1827, before me personally came Charles H. Hammond, Nathan Leavenworth and Duncan P. Campbell, whom I know to be the same persons described in and who executed the above deed, and severally acknowledged the said above deed to be their respective act and deed. And I do farther certify, that on the same day Charles H. Hammond, whom I know to be the same person who is chairman of the corporation styled "The Bennington Iron Company," and who, as such chairman, has subscribed the said above deed, personally appeared before me, and, being duly sworn, did depose and say, that the seal affixed to the said above deed is the corporate seal of the said corporation, and that the same was so thereto affixed by and under their authority.

Abr'm Ogden, Jr., Commis'r of deeds."

"Recorded, July 25, A. D. 1827, Book 13, pages 21 to 28 inclusive.
William Haswell, Town Clerk, Bennington, Vt."

Testimony was taken on the part of the orator, tending to prove that this mortgage was well executed and acknowledged according to the laws of the State of New York. It appeared, that the defendants Hammond, Leavenworth and Campbell were in fact owners of all the capital stock of the Bennington Iron Company, at the time the mortgage was executed. Copies of the records of the corporation were produced; but no vote was found recorded authorizing the execution of the deed in question; but it appeared that the corporation had paid the interest upon the bond semi-annually from its date until November, 1841, and that it was mentioned each year, under the title of "mortgage account," in the statement of the affairs of the corporation which was placed upon their book of records. It also appeared, that the seal affixed to the deed against the signature of Hammond, as chairman, was the seal of the corporation, which was kept in the custody of its officers. The other matters in testimony in the case are sufficiently detailed in the opinion of the court.

Such of the defendants as were attaching creditors also filed a cross bill; but as no questions of law were decided upon it, its purport, and that of the proceedings under it, need not be stated.

The court of chancery decreed, that the defendants should pay to the orator the amount due upon the bond and mortgage, with interest and costs, amounting in all to the sum of \$24,967,76, by a time

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specified, or be foreclosed of all equity of redemption in the premises; the court also dismissed the cross bill, with costs. From this decree the defendants appealed.

Isham & Southworth for orator.

I. The deed in question is well executed, under the statute of 1797. The requisites of a deed of bargain and sale under the English laws are required by this statute, with some others superadded; and—

1. There must be proper *parties* to the deed,—a grantor capable of conveying, and a grantee capable of holding. The party conveying, in this case, is the Bennington Iron Co., duly incorporated, with power to hold and convey real estate and have a common seal.

2. The deed must be *signed* and *sealed* by the grantor. The deed in question has affixed thereto the seal of the corporation. It is so stated to be in the acknowledgment, and on the face of the deed itself, and is proved to be such by the answers and testimony in the case. The deed also contains the signature of C. H. Hammond, as chairman and head officer of the corporation, opposite the seal. This, so far as *signing and sealing* is concerned, is all that can be done, where the act is that of a corporation and the deed is executed in the name of the corporation itself.

At common law the signature of a corporation was made by affixing its corporate seal. *Sugd. Vendors*, 501, 502. *Cutler et al. v. Hogg*, 1 N. R. 306. And such was the rule adopted in the following cases, where the corporate seal was affixed to the deed with the signature of the president, in the same manner as it is affixed to the deed in question. *Jackson ex d. Donally v. Walsh*, 3 Johns. 226. *Lovett v. The Steam Saw Mill Association*, 6 Paige 56. *Gordon v. Preston*, 1 Watts 337. *Beckwith v. Windsor M. Co.*, 14 Conn. 594. *Derby Canal Co. v. Wilmot*, 9 East 360. Affixing the seal of a corporation, alone, without the signature of a person authorized to affix it, has been held to be a compliance with the statute requiring *signing and sealing*. 3 Johns. 226. 15 Wend. 258. The statute of frauds requires a contract to be *signed* by the party to be charged. The seal of a corporation has been held to be, and necessarily must be, a *signing*, within the statute. *Yates, J.*, in 19

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Johns. 549. 21 Pick. 419. *E. L. Water Works Co. v. Bailey*, 4 Bing. 283.

It is claimed, however, that, in order to give this effect to the seal of the corporation, it should appear that it was affixed under their authority,—and that no evidence of such authority exists in this case. But it is believed, that none of the defendants can legally deny the authority under which the seal was affixed. If there had been a want of authority originally, the acts of *adoption* and *ratification* by the corporation would render the deed good, as against the mortgagors and judgment creditors, and estop them from denying it. *Gordon v. Preston*, 1 Watts 385. 2 Met. 167. *Skinner v. Dayton*, 19 Johns. 543. *HosMER, J.*, in 2 Conn. 254. *N. E. Insurance Co. v. DeWolf*, 8 Pick. 63. Ang. & Am. on Corp. 178.

But the assent of the corporation and the authority of Hammond to affix the seal to the deed is not only stated and certified in the acknowledgement, but it is a fact which the *law presumes*; this presumption may not be conclusive, but it casts the "*onus probandi*" on the defendants, to show an *entire* want of authority. 3 Phil. Ev., Cow. & H. Notes, 1062, 1286. 1 Ib. 386. 6 Paige 60. 22 E. C. L. 271. 24 Ib. 67. Ang. & Am. on Corp. 159.

This authority is proved, also, by the *actual presence* of *every stockholder, director, and person* interested in the corporation, at the time of affixing the seal,—and assembled for the very purpose of executing this deed. That, at such a meeting of the corporators, they may transact business relative to their corporate interests is very evident, even in case of *municipal corporations*. Wilc. on Corp. 26, §§ 79, 82. *Rex v. Theodorick*, 8 East 546. Under such circumstances deeds have been executed, and sustained; and it is believed not one case can be found, where such a deed has been held inoperative. *Derby Canal Co. v. Wilmot*, 9 East 360. *Jackson ex d. Donally v. Walsh*, 3 Johns. 226. 14 Conn. 596. 1 Watts 385.

But it is said, that our statute, requiring corporations to keep records, renders necessary the production of a *vote*, to show such authority. Independent of this statute, it has been repeatedly held, that, in proving the assent of a corporation, or their delegation of authority, the same kind of proof is admissible, as would be, in the case of natural persons. *STORY, J.*, in 6 Pet. Cond. R. 445, 446. *PARKER, J.*, in 1 Pick. 304, 308. 1 Watts 387. 3 Johns. 226. 2 Met. 167.

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9 East 360. 14 Conn. 596. This rule of evidence is not altered by that statute. The records, when properly authenticated, would be evidence in any proceedings against the corporation, but are not evidence against third persons, or even one of their own number, when prosecuting as creditor. *Hill v. M. & S. Water Works Co.*, 27 E. C. L. 220. The statute is directory, and an omission to make the required record does not render the proceedings void, but only renders the party guilty of the neglect liable to a prosecution therefor. *Bank of U. States v. Dandridge*, 6 Pet. Cond. R. 446. 9 Mass. 312. 8 B. & C. 29. 3 Pick. 335. 14 Mass. 167. 1 Phil. Ev. 409. 6 Vt. 315. 11 Vt. 307.

3. The statute farther requires, that the deed be *acknowledged*. No particular *form* is required ; and it is sufficient, if the certificate show on its face what acts were done, and a compliance with every substantial requirement of the statute. 1 Hopk. Ch. R. 239. 12 Ohio R. 377. The deed in question is well acknowledged, under our statute of 1797; for it contains the statement, and official certificate,—1, That Hammond was chairman of the corporation, and, as such, subscribed his name with that of the corporation ;—2, That the seal affixed to the deed was the seal of the corporation ;—3, That the same was affixed thereto by and under their authority. Hammond was the proper person to make the acknowledgment ; he was authorized to affix the seal, and it would be inconsistent to say that he could not acknowledge it. *Bank of England v. Chambers*, 31 E. C. L. 99. *Gordon v. Preston*, 1 Watts 385.

II. Did the statute of Nov. 3, 1815,—providing that private corporations may, by their vote, authorize their president to convey, &c., and that the deed of such president, reciting the vote, shall be sufficient to pass the estate,—*repeal*, or *modify*, the provisions of the statute of 1797, so far as corporations are concerned, so that they cannot execute their conveyances under the statute of 1797? It is believed, that this statute only provides an *additional mode* of conveyance,—leaving it optional with *corporations* to execute their conveyances under the statute of 1815, or that of 1797.

In the construction of statutes we are to consider the “old law, the mischief and the remedy,” and give such a construction as shall correct the mischief and provide a remedy. The old law was the statute of 1797, and all conveyances under that statute were to be

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by affixing a corporate seal. To give corporations a more simple form of conveyance, and to enable them to convey, where no provisions for a corporate seal had been made, was the object of the statute;—hence the provisions of the statute of 1815, for passing a vote and reciting the same in the deed, and providing that the deed of the president should be sufficient,—thus providing a mode of conveyance for those corporations which have no common seal, and which could not execute their conveyances under the statute of 1797, and leaving those corporations, which have a common seal, and which could have executed their conveyances under the statute of 1797, to adopt the provisions of either, at their discretion. This construction is favored by the previous legislation of this state.

That a discretionary right, or power, was intended to be given is made apparent from the language of the statute itself, in the use of the word "*may*." This word is used, where a discretionary power is given, and, in a statute, is always so to be construed, unless a duty is to be performed for the *public benefit*, or in furtherance of *public justice*. *Malcom v. Rogers*, 5 Cow. 188. 2 Chit. 251. 5 Johns. Ch. R. 112. 1 Pet. R. 46. So where a party has a remedy by statute, or common law, and a statute is passed giving another, the party has his election to adopt either. As effect can be given to both, one shall not be a repeal of the other by implication,—“for the law does not favor repeals by implication.” Dwar. on St. 637, 638. 14 Wend. 250. 2 Caine 169. 1 Saund. R. 38, n. 2. 5 Cow. 165. 10 Pick. 383.

The statute of 1797 is not expressly repealed by the statute of 1815, and it will not be a repeal, unless such was the intention of the legislature, to be found by the application of certain and definite rules of law. 1. This intention to repeal cannot be found, unless it is expressed in *clear* and *explicit* terms. Dwar. on St. 717. 10 Rep. 138 b. 2. When both statutes are affirmative, an intention in the one to repeal, or modify, the other, can never be found, without *negative words*, showing such intention, or unless there is such a repugnancy in them, that the provisions of one cannot be adopted, without the positive violation of the other. 3 Howard 636. Broom's Legal Max. 12. Dwar. on St. 639, 674. 3. If a subsequent statute can be reconciled with a former, and both have effect, the latter shall not repeal, or modify, the former. Dwar. on St. 674. 15 Wend. 258. 6 Bac. Abr. 373 B, 377 G.

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But the repeal of the statute of 1797 by that of 1815 is urged, on the ground that an affirmative statute, "*introductive of a new law*," implies a negative. But in this case the statute does not give a new right, but simply a new method, by which a previous right may be exercised. The maxim "*Leges posteriores priores contrarias abrogant*" is urged as a principle, under which the statute of 1797 is repealed by that of 1815. But it is under the application of this very maxim, that it has been held, that affirmative statutes shall not repeal a prior statute, without the use of negative words, or unless there be a positive repugnancy between them. If these do not exist, the later statute is auxiliary, and gives a discretionary right to adopt the provisions of either. Broom's Legal Max. 12. It is farther said, that, as the charter of the corporation does not direct how their conveyances are to be made, they are to be governed by the general law, and that the statute of 1815 is to be construed, as if incorporated in the charter. But the very question is, what is the general law? While the defendants claim it to be the statute of 1815, we claim it to be the statute of 1797.

John S. Robinson and Hiland Hall for defendants.

I. A deed executed in one state, conveying land lying in another, must be executed with all the formalities and in the manner required by the *lex loci rei sitae*. *United States v. Crosby*, 7 Cranch 115; 2 Cond. R. 437. *McCormick v. Sullivan*, 10 Wheat. 192; 6 Cond. R. 71.

II. This mortgage was executed while the statute of 1815, [St. 160, § 3,] was in force, and is defective in three statute requisites.

1. It is not the deed of the president; *Warner v. Mower*, 11 Vt. 385; it purports and was intended to be drawn and executed as the deed of the corporation; it is, to be sure, signed by the president; but the signature of a person to a deed, who, in the body, or granting part, evinces no intention to be bound, is inoperative. *Catlin v. Ware*, 9 Mass. 218. 7 Mass. 26. 13 Mass. 223.

2. No vote of the corporation is recited in the deed, authorizing the conveyance. The vote, like a power of attorney, is the evidence of the authority by which the deed is executed; and a purchaser is not bound to look beyond the deed on record for it.

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3. The mortgage is sealed with the corporate seal, and not with the individual seal of the president. It is true, it bears the seal, signature and acknowledgment of Hammond; but it was thus executed by him in his individual capacity, for the purpose of conveying his interest in the capital stock of the corporation.

III. The question, then, is, whether section three of the statute of 1815 is inoperative, so as to preclude a conveyance by corporations in any other manner, than that there prescribed.

1. The statute of 1815 is to be considered as a general provision for the government of all corporations thereafter created; and the charter of The Bennington Iron Co. must be understood as referring to it; and the third section, relative to conveyances, and the ninth section, relative to the keeping of records, are to receive the same construction, as if incorporated into the charter. Such a provision in the charter would have been inoperative and exclusive. *Ang. & Am. on Corp.* 188, 229. *Head v. Amory*, 2 Cranch 166. *Ontario Bank v. Bunnell*, 10 Wend. 186, 194. *M'Cartee v. Orphan Asylum*, 9 Cow. 507. And in *Wheelock v. Moulton*, 15 Vt. 521, this very question was decided.

2. The fifth and ninth sections of the statute of 1797 do not embrace corporations;—1, They relate only to such deeds as require *signature* by a grantor, who can acknowledge, and this a corporation aggregate cannot do;—2, The whole law relating to acknowledgment requires that it be done *in person*, and cannot apply to a corporation aggregate. 5 *Cruise Dig.* 99, § 51. *Co. Lit.* 67 a. 6 *Vt.* 121. 2 *Mass.* 37. 16 *Johns.* 5. 10 *Vt.* 241. 15 *S. & R.* 176. *Ang. & Am. on Corp.* 339. And the following cases do not contravene the principle of the cases before cited, that a corporation is not included in the provisions of a statute, which requires an act to be done *in person*. *United States v. Amedy*, 11 *Wheat.* 392; 6 *Cond. R.* 362. *Ontario Bank v. Bunnell*, 10 *Wend.* 186. *Rex v. Gardner*, *Cowp.* 79. 2 *Plowd.* 536. *People v. Utica Ins. Co.*, 15 *Johns.* 382. 5 *Cruise Dig.* 200. *Ang. & Am. on Corp.* 195, 196. The conclusion to be deduced from these cases is, that a corporation, prior to 1815, unless special provision was made in the charter, could only execute a deed as at common law, which must stand upon common law proof. *Jackson ex d. Donally v. Walsh*, 3 *Johns.* 226. This view is supported by the fact, that the fifth section of the stat-

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ute of 1797 is almost a literal transcript of the statute of 1779,—when it can hardly be supposed the legislature were enacting a law for corporations, in anticipation of their future existence. Besides, it is an historical fact, that, prior to 1815, corporate privileges had been granted to few, if any, other than literary institutions and turnpike companies. In respect to land held by The Vermont State Bank, special provision was made in the charter; 2 Tol. St. 76, § 10; Acts of 1817, p. 17; and turnpike companies were authorized to convey *in the manner provided by their by-laws*. Acts of 1803, p. 70. Acts of 1805, p. 153. Acts of 1807, p. 133. Acts of 1808, p. 162. Acts of 1811, p. 120. Acts of 1813, p. 191. Acts of 1814, p. 91. In 1815 six turnpike charters were granted, all of which omit the above provision, and refer, for the government of the corporations, to the general law. Acts of 1815, pp. 57, 76, 79, 97, 111, 143, 146, 156, 172. This shows, that the legislature did not consider that these corporations could convey, under the statute of 1797.

3. The statute of 1815 is affirmative, and introductory of a new law. In such a statute the word "*may*" is equally imperative with the word "*shall*." 6 Bac. Abr. 377. 1 Sw. Dig. 13. But if corporations could execute a deed under the statute of 1797, did the statute of 1815 introduce a new law? Under the former statute the deed must be that of the corporation,—and under the latter that of the president. Under the ninth section of the statute of 1797, an authority to execute a deed must be delegated by power of attorney, signed, sealed and acknowledged. Under the statute of 1815 the vote of the corporation not only conferred on the president an authority to convey, but vested in him "a special right in the fee for the purpose of the conveyance." But if the ninth section of the statute of 1797 is held to apply only to natural persons, then we have no statute prescribing the mode in which the authority should be delegated, unless the statute of 1815 is imperative; and in such a case the rule is, when corporations have no specific mode of acting, the common law mode may be properly inferred. 2 Kent 290. *Fleckner v. Bank of United States*, 8 Wheat. 338. By the common law such authority must always have been conferred by deed. 13 Petersd. Ab. 506 n. 5 East 239. 12 Mod. 584. 1 Rol. Ab. 514. 2 Plowd. 535. Therefore the statute of 1815 did introduce a new

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law; and to attain the true construction of this act, we must consider the old law, the mischief and the remedy. The common law required the agent to be empowered by deed, but did not require the deed and power to be acknowledged and recorded. The statute of 1815 was passed to remedy both of these defects, and to carry out the recording system, which requires the written evidence of title to real estate to be placed upon record, for the information of the public. This is decisive of the intention of the legislature, that the statute of 1815 should be imperative. *Malcomb v. Rogers*, 5 Cow. 188. *Rex v. Barlow*, 2 Salk. 609. *Rockwell's Case*, 1 Vern. 152. *Stamper v. Miller*, 3 Atk. 212. *Roles v. Rosewell*, 5 T. R. 538. *Hardy v. Bern*, 5 T. R. 540. *Walcot v. Goulding*, 8 T. R. 126. 2 Sw. Dig. 132. *Downer v. Hazen*, 10 Vt. 418. Rev. St. 311, §§ 1, 3.

4. But if the statute of 1797 did embrace corporations, then it is insisted that it was repealed by the statute of 1815, upon the principle, that *leges posteriores priores contrarias abrogant*. It contained no words of repeal, for the obvious reason, that it professed to provide for but one class of grantors,—while the former statute referred to all. *Titcomb v. Union Ins. Co.*, 8 Mass. 326. *Hussey v. The Manf. & Mech. Bank*, 10 Pick. 420. *Manf. Co. v. Vanderpool*, 4 Cow. 556. *Caruthers ex parte*, 9 East. 44. *Harcourt v. Fox*, 1 Show. 520. *Rex v. Cator*, 4 Burr. 2026. 14 Petersd. Ab. 516 n. Ang. & Am. on Corp. 112.

IV. But this deed is defective, under the statute of 1797, in three statute requisites.

1. The name of the corporation is not subscribed to it by the officer executing it. It is insisted, that the agent of a corporation, like the agent of an individual, must, in executing the deed, *subscribe the name* and affix the seal of the principal. Ang. & Am. on Corp. 159, c. 7. Moore 70, pl. 191. 13 Petersd. Ab. 510. Am. Jur., No. 5. *Savings Bank v. Davis et al.*, 8 Conn. 191. The signature to this mortgage is defective, precisely like the case cited from Moore; the addition to the name of Hammond is merely descriptive. *Spencer v. Field*, 10 Wend. 87. *Taft v. Brewster*, 9 Johns. 334. Deeds signed in this manner have been uniformly held insufficient to bind the principal; and the reason assigned is, "the power of attorney vests no interest, or estate, in the agent, none can pass from him,

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nor can any pass through him, unless in the name of the principal, who hath the estate." *Payley on Ag.* 153. *2 Kent* 630. *1 Sw. Dig.* 131. *1 Ph. Ev.* 145. *Combe's Case*, 9 Co. 75. *2 Ld. Raym.* 1418. *4 Str.* 705. *2 East* 142. *White v. Cuyler*, 6 T. R. 177. *Fowler v. Shearer*, 7 Mass. 14. *Elwell v. Shaw*, 16 Mass. 42. *8 Pick.* 61.

It is attempted to establish this deed under the statute of 1797, upon the principle of the common law, that the signature of a corporation is its seal. But when the legislature required a deed to be signed and sealed, the words were not used as synonymous; they are significant of the acts required to be done, and each hath acquired a determinate meaning by judicial decision. *Pow. on Dev.* 42, 51. *4 Vt.* 471. *5 Johns.* 237. *6 Cruise's Dig.* 62. Neither under the statute of wills,—*Jarm. on Wills* 69 b, *Pow. on Dev.* 45, 17 Ves. 458, *3 Stark. Ev.* 1682,—nor when an award is required by the submission to be under the hands and seals of the arbitrators, is sealing signing; *Wats. on Awards* 41, 217; *3 Stark. Ev.* 1199; *6 Taunt* 645; *2 New Law Lib.*, No. 1, 54. In *Sugd. on Vend.* 501, it is said, a corporation affixing their seal is tantamount to a signing and sealing by an individual; and the authority cited is *Doe v. Flagg*, 1 N. R. 306. In that case the question arose upon the execution of a promissory note, under a statute which required the "name, or names, mark, or marks," to be signed to the note; and the court held, that "a corporation could only bind itself by its corporate seal," and the seal being affixed to the note was a sufficient compliance with *the words of the act*. The first point ruled, that a corporation could only bind itself by the corporate seal, is unsupported by authority; *Ang. & Am. on Corp.* 152-3. The case was decided upon the peculiar wording of the act, and the *dictum* of the court in *3 Lev.* 1, that *signum* signified only a mark, and sealing was a sufficient mark. *Pow. on Dev.* 42. But in the statute of 1797 *signing* means a subscription of the grantor's name to the deed, and *sealing* means an impression upon wax, wafer, or other adhesive substance.

2. No officer, or agent, of the corporation was empowered by deed, or otherwise in writing, to execute this mortgage. It being proved, that the corporate seal is affixed to the deed, it is claimed, that the court will presume it was affixed by proper authority. But this presumption is rebutted by the introduction of the corpora-

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records, which show that no vote was ever passed, authorizing Hammond to convey. Ang. & Am. on Corp. 157, 158. 8 Conn. 204, 210. *Lumbard v. Aldrich*, 8 N. H. 31. 2 Met. 163. Under the statute of 1797 it is insisted that a corporation could only empower an agent to convey their real estate by a power of attorney, executed in the manner required by the ninth section ; Chip. R. 150, Ed. of 1793 ; *Savings Bank v. Davis et al.*, 8 Conn. 209, 210; and if they could not do that, then a power of attorney, executed as is required by the common law, must be adopted. 2 Kent 290. 8 Wheat. 338. 2 Plowd. 535.

3. This mortgage is not acknowledged, or proved, as the deed of the corporation, or president. *Hinde's Lessee v. Longworth*, 11 Wheat. 199 ; 6 Cond. R. 274. *Stanton v. Button*, 2 Conn. 527. *Pendleton v. Button*, 3 Conn. 406. *Hayden v. Wescott*, 11 Conn. 129. The certificate is not evidence of proof of the deed, because the contingency, upon which the proof of a deed will be taken in lieu of an acknowledgment, had not arisen.

The thirtieth section of the statute of 1797 will not aid this certificate ; that section was not intended to permit any other execution of a deed, than that prescribed in the statute.

The opinion of the court was delivered by

REDFIELD, J. This is a case of great magnitude, and, on many accounts, of considerable difficulty ; and having been three times argued before this court at great length, and with such uncommon thoroughness and ability, as to leave little ground for expecting much additional aid in that way ; and having obtained the opinion of all the members of the court, who can act in the determination of the case, we have deemed it proper not longer to delay the decision. Of the two members of the court now absent, who were present at both the former arguments, the Chief Justice concurs with the decision made below, but in some respects upon different grounds, perhaps, and Judge Bennett with the opinion which is now to be pronounced, as the opinion of the court ; and he also concurs, in the main, with Judge Kellogg and myself in the grounds of the opinion. Judge Davis, who concurs in the result, but not fully in the reasons and grounds by which we arrive at that conclusion, will deliver a separate opinion.

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We have stated the results of the three consultations and intervening examinations of this case thus minutely, that the parties may be able to form a just estimate of the propriety of having the case further discussed, and may perceive that every chance has been afforded the orator, which could reasonably be supposed to be of any avail. And we have all felt sincerely desirous of upholding the deed, if it could be done without too great violence to established principles. We will now state, as briefly as possible, the reasons, which have seemed to us invincible, in the way of such a determination. See Lord Denman's remarks, at the close of his opinion in *Hilton v. Earl of Granville*, 48 E. C. L. 730.

It should be borne in mind, that here is no question in regard to the present validity of this deed, as against the corporation. They make no question of that kind; the bill is taken as confessed against them; and the orator is entitled to his decree, so far as they are concerned. And if it were originally defective as a statute conveyance, it is, at all events, evidence of a contract to convey; and a court of equity will, in such cases, always decree a conveyance *according to the contract*. And if there were any defect of authority originally in the persons who professed to act on the part of the corporation, the deed has been so repeatedly recognized, by votes of the corporation, as a good deed, that the corporation would now be held fully to have ratified it;—but this will not give it effect, as a registered deed.

But the great question in this case is, whether this deed was so executed, as to be entitled to registry, under our statute. If not, then clearly the orator cannot expect to prevail. For it has been too often determined to be now brought in question, that the *registry* of a defective deed is no notice of title to any one. It is not evidence of the facts which it contains, as the *original* would be. If defective, as a deed, in the formal requisites of its execution, or proof, it is not entitled to registration at all, any more than any other instrument whatever.

It will next be important to inquire, then, how a deed of land must be executed, to entitle it to registration. Upon this subject, we apprehend, there can be but one opinion. It must be executed according to the statute requisites, by which the registry of deeds is established. It never has been contended, since the enactment

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of our statutes requiring deeds of land to be executed with certain specified requisites, that a deed, executed merely according to the common law requirements, was good to convey the land, or that such a deed was entitled to registration. And to establish such a proposition, at any time, would be a virtual repeal of the statute, and would be especially strange, not to say absurd, after more than half a century of uniform acquiescence in regard to the construction of the statute.

It must, then, be admitted upon all hands, that all deeds of land, to be entitled to registration, must conform substantially to the requisites of the statutes; in other words, that the statute mode of conveyance is *exclusive of*, and did, when it came in force, repeal all others, so far as it provided a *new mode* of conveyance. If, through design, or inadvertence, its provisions were wholly inapplicable to any class of persons, natural, or artificial, then, doubtless, their rights would not be affected by the statute in any way. They would remain just as they were before. In this state of the case it has been made a serious question in the argument, whether the plaintiff's deed was sufficient to have entitled it to registration, if the statute of 1797 were still in force, at the time the deed was executed. This, it seems to us, is taking for granted the main question in the case.

It seems to us, that, if we concede that corporations may convey land under the statute of 1815, and also under that of 1797, it follows, of course, that they may, also, in any of the modes pointed out by the common law, and that natural persons may, also,—which we have already considered, as to natural persons. But why artificial persons should any more be authorized to convey in *two* different modes, than natural persons, is certainly not easy to conjecture. It does not seem to us, that it ever would have occurred to any one, as a mere *a priori* argument. But when a case occurs, and especially one of such magnitude as the present, an anxiety to save it will suggest modes of argument, which nothing else, almost, will; and especially, when some technical requisite has been omitted *through inadvertence*, will courts go very far to uphold a conveyance,—and more especially, when it has been long acquiesced in. But this relaxation must have *some limits*, and must not be ex-

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ercised by a mere arbitrary discretion of the court. If that were so, no one could ever form any opinion what would not be held good.

Is there, then, *any rule*, by which this deed can be made good. No other, it seems to us, except to make out, that the statute of 1815 still left the statute of 1797 in force as to corporations. This it seems impossible to maintain with any degree of plausibility. The statute of 1797, it is acknowledged on all hands, had no natural adaptation to the case of corporations. It is matter of history, that the profession generally entertained serious doubts, whether a corporation could execute a deed in conformity with the statute of 1797,—whether, in fact, the common law mode of conveyance, as to corporations, was not still in force. This is evidenced by the repeated specific provisions, contained in the charters of corporations before 1815, directing the mode in which they should convey their real estate. This continued to be the very general practice of the legislature until the time of passing the statute of 1815; since that time these special provisions in charters have wholly ceased.

These facts constitute a legislative declaration,—1, That the statute of 1797 was defective, as to its application to corporations; 2, That the statute of 1815 was passed to *remedy that defect*; 3, That subsequently corporations were expected to convey in accordance with the provisions of the latter statute. The case, then, seems to us very much the same, as if this statute of 1815 had been *originally* a part of the statute of 1797,—as it now is of the Revised Statutes. For all statutes in regard to the same subject matter are to be construed together, as parts of one system. If, then, it had been provided originally, that *all* deeds should be executed in the manner pointed out in the statute of 1797, but that corporations might convey land by the deed of their president, reciting the vote authorizing the conveyance, when it was found that the general provisions *did not apply to corporations*, could there be any doubt, that the mode pointed out, in regard to them, was intended to be the *exclusive* mode, in which such bodies should convey land? None, I apprehend, whatever. But is not the present case, in connection with the acknowledged history of the occasion of passing the statute of 1815, quite as conclusive as the case supposed?

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If the provisions of the statute of 1815 had been included in the charter of this corporation, it would, it seems to us, be somewhat difficult to argue, that they might still convey their land, in disregard of the specific provisions of their charter, under the general law of 1797, which had no natural adaptation to the case of conveyances by corporations, and which is, in fact, known to have been adopted with principal reference, and probably exclusive reference, to natural persons. It seems to us such a course of argument will find few advocates bold enough to defend it. But is it not a universal principle, in regard to the law of corporations, that their charters are subject to all the general laws, in force at the time of their creation, as much, precisely, as if those general laws had been specifically repeated in their individual charters? Was not that confessedly the intention of the legislature, in passing the statute of 1815? The facts already alluded to sufficiently show this.

The expression in the statute of 1815, "may convey" &c., is, it seems to us, not difficult of explanation. It is more consonant to sound sense and good taste, to use that form of expression, when the legislature is conferring a *power*, to be exercised at the discretion and for the benefit of the corporation. The form of expression "*shall convey*," when they might never have occasion to convey, would be very inappropriate to express the idea intended. But when some *duty* is *required* of the corporation, as *keeping records*, then the appropriate term is "*shall keep*,"—which we find to be the case in this very statute. How very absurd would an interchange of these forms of expression sound,—The corporation *may* keep records, but *shall* convey land.

We cannot, then, as we think, hold, that the statute of 1815 merely superadded another mode of conveyance by corporations, leaving the former mode, whatever it was, still in force, and giving them an election which to adopt, without violating the rules of construction already stated, and, still farther, holding that a subsequent statute, making *other* and *more specific* provisions as to the same subject matter, still leaves the former statute in force. We think no case can be found, going this length. It must be admitted, that the case cited from 3 Howard's Rep. goes great lengths,—no doubt to the very extreme verge of sound construction; but it stops far short of what is here asked for. It is, in fact, rather an authority in favor

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of the view we adopt, in one particular, when it is held, that the subsequent *specific* provisions did repeal the former *general* provisions, in requiring justices of the peace to be commissioned by the court, in order to take the acknowledgment of deeds in the case under consideration.

Whether a new law, by implication, supersedes an old one upon the same subject cannot well be determined, in most cases, by any merely *a priori* rules of argument, or construction, but must depend very much upon the peculiar circumstances of each case,—the old and the new law,—the mischief and the remedy. If I were to illustrate the subject by a homely comparison, I could, perhaps, adopt none more in point, than that of the *discontinuance* of an old road by laying out a new one, merely, *without any other act*. If the new road wholly superseded any necessity whatever for the old one, then the old one would be *discontinued by implication*,—otherwise not.

The statute of 1815 seems to have been intended to put deeds executed by corporations upon the same footing with other deeds, executed by virtue of a *power*,—that is, that the power itself should appear upon the record. Hence the vote authorizing the president to convey land must be recited in the deed. We do not consider, that the corporation must always convey their land by an officer called a president. It does not seem very important, what the name of the officer, or agent, is, or whether he have any name; but the essence of the requisition is, that the deed must be executed in pursuance of *some vote of the corporation*, and that this vote must be *recited* in the deed. And this, we think, after the passing of the statute of 1815, was intended to be the *uniform* and the *only* mode of conveying land by corporations.

I know of no rule of construction of statutes of more universal application, than that later and more specific statutes do, as a general rule, supersede former and more general statutes, so far as the new and more specific provisions go. I think, too, that the case of *Wheelock v. Moulton*, 15 Vt. 519, has fully decided this very case, and upon this very ground. For although there were two grounds urged in that case, and both, to my mind, free from doubt, yet the court were *agreed* only upon the *first ground*,—that a deed *signed by all the corporators*, and professing to convey the land of the corporation, *was not binding upon the corporation*, unless ex-

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ecuted in pursuance of some vote of the corporation, and in conformity with the statute of 1815. I thought, to be sure, that that deed did not describe any land of the corporation; but upon that point the court were not agreed, and the case was decided, and was intended to be put, mainly upon the other ground. It is certainly a new mode of getting rid of the authority of a decision, that because it is put upon two grounds, it is authority upon neither.

But under the statute of 1797 we have to adopt a very liberal construction, in order to bring this case within its provisions. It is almost as difficult to save this case here, as upon the other ground, it seems to me.

1. In regard to there being any proper evidence of the consent of the corporators to the deed, before its execution. And if the deed was not executed by the consent of the corporators, at the time of its registration, then no after confirmation by the corporation will give it validity, as a registered deed. And if not a valid registered deed, then it will not take precedence of the defendants' attachments, unless upon proof of notice to them of the existence of the deed, after its confirmation by the corporation,—which is not attempted.

Upon the point of the consent of the corporation to the execution of this deed, I readily admit, that we are not to require unreasonable or unusual proof. If a corporation keep no records, and are by law required to keep none, then we must be satisfied by oral proof of the consent of the members;—and such is the rule at common law, and in many of the states. But in a case like the present, where the corporation keep continuous records of all their doings, as much as a town, or city, or other municipal corporation, and where these and all similar corporations are by express statute required to keep such "record of all their doings," which shall be open to the inspection of all persons interested therein, is it unreasonable to require, that some consent to the conveyance shall be shown by such records, or at least by some vote of the corporation, when the members were regularly assembled for that purpose? Unless we do require this, we disregard the statute of 1815 in another important particular, and go back to the common law, or the law of New York, instead of the law of Vermont.

I do not insist, that there must have been a vote authorizing this

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conveyance *in express terms*. But certainly there must have been this, or the appointment of such a board of directors, as would, by fair implication, possess this power. Nothing of this kind appears,—certainly, unless it is to be inferred from the fact of all the corporators being present at the time of the execution of this deed. But all except Hammond were present for the purpose merely of conveying *their stock*. They did not meet for the purpose of acting in regard to any corporate business, nor does it appear that they were at all *consulted in regard to it*. But they *now* say they consented to the execution of the deed,—that is, I suppose they made no *express resistance* and now think they *were willing* at that time. This is just that convenient degree of uncertainty, that will permit one to incline the evidence of consent according to his present wishes, or prepossessions. If these corporators *now* felt an interest in defeating this mortgage, can it be doubted, that they might, with perfect and strict regard to truth, testify that no vote, or consent, of the corporation was ever given to this deed, and that a majority of the corporators did not dissent, because they were not consulted,—and thus leave it, *where it is*, the mere act of the chairman?

It is not probable to my mind, that those, who advised the manner of executing this deed, supposed it was necessary to have the consent of any one, except Hammond, so far as the execution of the deed by the corporation was concerned, or that they had any suspicion, that the law governing the corporation required records of all their doings to be kept. This part of the statute is express; it is *shall*, and not *may*; and why was this provision of the law also disregarded? For the same reason, doubtless, that the whole business of this corporation has been conducted in reference to the law of another state. It is not a little remarkable, that the New York conveyancers, who drew this deed, should not have thought of the propriety of conforming to the laws of the state where the corporation was created, and where it existed, if any where, and where the land was situated.

Many of the views above expressed are certainly confirmed by the reasoning of the court in *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 Pet. Cond. R. 440.

2. But if we could get over this point, it is still obvious, that this deed is not *signed*, within any fair and reasonable construction of

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the statute of 1797. The statute requires a deed of land to be *signed*, for the very same reason that certain contracts are required by the statute of frauds to be signed,—that they may not be exposed to the uncertainty of oral proof. No one doubts, that such was the intention of our legislature, in requiring conveyances of land to be signed by the grantor. And I do not understand, that it is contended, that *signing*, in the case of a conveyance by *natural persons*, can be dispensed with. And I confess I do not well comprehend the force of the argument, which dispenses with signing by corporations. This is done in England, I admit, and in New York, in many cases.

This is urged, first, upon the ground of necessity. But there can be nothing in this. A corporation may *sign* a deed, as well as *seal* it. Both must be done by some agent. And so may natural persons do both these acts by the *hand* of some one, *in their presence*. But still there is a necessity that the *name* of the grantor should be *subscribed*, to designate it as his deed.

But it is farther said, that *sealing*, in the case of a corporation, is *equivalent to signing and sealing* by a natural person. But this is not true. The seal does not designate the corporation, any more than the seal of a natural person. If it were so, there might be some soundness in the argument. But being otherwise, I do not see why the *name of the corporation* should not be subscribed to the deed of land, as much as that of a natural person, and for the same reason. Upon any other construction, it seems to me, we make the conveyance to rest in *parol*, and that we might just as well dispense with *signing* in *all cases*.

3. I shall spend no time upon the acknowledgment. It is not attempted to be sustained upon the ground, that, being executed in New York, it may be proved according to their laws. Such a construction of our statute of conveyances has never obtained. *Proof of a deed by a witness* can only be resorted to in another state, when such a case occurs, as admits of *proof* in this state, as where the grantor *refuses to acknowledge, is dead, or has removed, &c.*

But this acknowledgement is much like the rest of the deed. It is no acknowledgement, no pretence of any such thing; it is proof, and nothing else,—treating Hammond as a subscribing witness to the deed. But, inasmuch as, if he could seal the deed, he could

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also acknowledge it, we are asked to treat his testimony as an acknowledgment. That is undoubtedly making it something, which it was never intended to be. But, as the one who attempted to prove it was the one to acknowledge it, if any one had any such authority,—which is not shown,—if we could get along with the rest of the case, I think we could with this part of it.

The case of *Burrell v. Nahant Bank*, 2 Met. 163, is no authority for this case. The only question there was, whether the mortgage was good against the bank; and the court held it good, on the ground of ratification. The case of *Gordon v. Preston*, 1 Watts 385, comes very near in point, but differs in one essential particular from the present case. That deed seems to have been in *proper form*, and the only objection was a defect of *authority* in those who executed it,—which defect, it was held, was cured by subsequent ratification. Perhaps, if this deed had been a full compliance with the requisites of the statute, we should not have held it void for any irregularity in the original power to execute it, after long acquiescence. *The King v. Theodorick*, 8 East 543, only shows, that all the corporators, being present, may transact any business, being competent for them to do. But this must be understood, when no statute of the corporation forbids such action in such manner. I have no doubt, that the members, being all present, might have conferred the authority;—and so might they in the case of *Wheelock v. Moulton*, 15 Vt. 519. But it was expressly held in that case, that all the corporators signing the deed did not amount to the action of the corporation. There must be some action as a *corporation*,—some consent given with *intent to bind the corporation*.

Beckwith v. Windsor Manufacturing Co., 14 Conn. 594, was a case against the corporation merely, and the deed was executed in pursuance of a vote of the corporation. The only question in that case was, whether the vote must be under seal, or recorded in the town clerk's office. *Derby Canal Co. v. Wilmot*, 9 East 360, seems to recognize the principle, that affixing the seal of a corporation is sufficient to pass the title to land, if it be done with that intent. But there is no pretence, that the common law of conveyance is in force here. The cases from New York show, most undoubtedly, that such is the rule there. 6 Paige 56. 3 Johns. 226. But these decisions cannot affect the present question. This deed is no doubt

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good enough in New York, and was executed with reference to their laws. From the case of *The Proprietors of the Mill Dam Foundry v. Hovey*, 21 Pick. 417, it is evident the practice in Massachusetts is, that deeds of land by corporations are to be *signed* by some *agent* authorized to do so, as well as sealed.

The result is, that the decree of the chancellor must be reversed, and the case be remanded to the court of chancery, with a mandate to dismiss the bill, with costs, as to all the defendants except the corporation, and to allow the orator to take such a decree as he may be advised against the corporation, consistent with the scope of his bill.

The decree of the chancellor, dismissing the cross bill, is affirmed, with additional costs.

DAVIS, J. While I concur in the result just announced by the presiding judge, I find myself compelled to dissent from several of the positions assumed in the opinion delivered; and as they embrace points of much practical importance, which may hereafter come under discussion, I feel unwilling to let the occasion pass without some remarks in reference to them. The strong and acknowledged equity of the orator's claim, I confess, inclined my mind to yield assent to the arguments and authorities adduced to obviate mere technical objections to this mortgage. Notwithstanding this natural bias, and notwithstanding there are respectable authorities which go the full length of sustaining it, still, after such consideration as I have been able to give the subject, I am constrained to admit, that, on some material points, the weight of reason and authority seems to be adverse to the validity of the orator's claim.

Besides, this case has been, I am informed, three times argued before this court, and first and last, at least, before all the judges competent to sit in it. On the present occasion much labor and research have been bestowed upon it by the counsel on both sides. Having reference to the known and supposed opinions of the other members of the court, I am satisfied, that, were my doubts of the propriety of the general result more tenacious than they really are, it would be my duty, as the junior member of the court, to surrender them, rather than be the means of protracting an expensive controversy, with no prospect of farther elucidation, and with little or no reason to anticipate in the end a different result.

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That this mortgage must fall before the statute of November 3, 1815, if that statute is to be regarded as the sole source of authority in the corporation to convey their lands by mortgage, I have no doubt; for the deed does not purport to have been executed by any one as president of the corporation, nor does it contain any recital of a vote empowering Mr. Hammond, or either of the other two persons, whose names and seals are affixed to the instrument, as president, director, or in any capacity, to execute the same.

This instrument is in the form of an indenture between three parties, the Bennington Iron Company,—Charles H. Hammond, Nathan Leavenworth and Duncan P. Campbell,—and Francis Depeau, the orator's intestate. It purports to have been signed and sealed by Hammond, as chairman of the company, and by Hammond, Leavenworth and Campbell, as individuals, but is not signed by Depeau, who is, in the body of the instrument, styled the party of the third part. It recites the act of incorporation, the fact that the three individuals above named were the sole owners of the capital stock, and that the corporation and the stockholders were jointly indebted to the orator's intestate in \$20,000, for which they had given their joint bond, conditioned for the payment of the same by a time specified, and then proceeds to convey by mortgage, to secure the payment of said sum of money, certain lands in Bennington, belonging to the corporation, and also the shares in the capital stock owned by the above stock holders.

By reference to the act of incorporation it appears that a president is not particularly provided for; and it does not appear, that such an officer was in existence at the date of the mortgage. There was not and could not therefore be a compliance with the requirements of section three of the statute of 1815. A vote authorizing the chairman, if indeed it is not absurd to suppose the continued existence of an officer by that name, to make a conveyance would be no compliance with the law. The deed, however, recites no such vote; and it is not pretended, that, in point of fact, any such vote was ever passed. Were it otherwise, the declaration on oath of Mr. Hammond, that the seal affixed to his name was the corporate seal, and was so affixed by him by and under the authority of the corporation, whether made in the form of an acknowledgment be-

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fore the commissioner in New York, or otherwise, cannot be received as a substitute for the antecedent corporate vote, and the recital thereof on the face of the deed, as required by the statute. Even if this kind of evidence were admissible, it falls short of the statute requirement, inasmuch as the authority claimed has reference only to the affixing of the seal, and has none whatever to the signature. Signing by the principal, or by a properly constituted agent, is at least as essential as sealing; and no valid conveyance by deed could be made without one, as well as the other.

These considerations are abundantly sufficient to satisfy me, that, under the statute of 1815, this mortgage cannot be supported. Had the whole question rested here, I should not have felt called upon to make any remarks. I cannot accede to the position, that this statute must be so construed, as to exclude every other mode of alienation by a corporation previously in existence.

There is nothing in its language importing any such exclusion. It is the first general statute, indeed, specially providing for conveyances of real estate by corporations; yet it is not seriously pretended, that, prior to 1815, turnpike, manufacturing, and other corporations, most of which were, in their several charters, authorized to purchase and convey real estate, could not, under the law then in force, make a valid conveyance by mortgage, or otherwise.

The general statute of 1797, prescribing certain formalities to be observed in the conveyance of real estate, though it does not name corporations, and though its language, in some respects, seems not precisely adapted to these artificial persons, has nevertheless been always understood to authorize conveyances by them. They can, indeed, neither sign, nor seal, a deed, nor acknowledge it before a magistrate, as required, without the intervention of an agent; but by such agent they can do all of these acts. Under that statute this corporation could have executed a valid mortgage of their lands to Depeau, unless it is to be regarded as superseded by the statute of 1815. Whether this conveyance is, in fact, in conformity to the former statute, I shall consider presently.

It is unquestionably true, that a subsequent statute may often be construed as abrogating an antecedent one, without special words of repeal, or extension. Many cases of this kind are to be found in our statute book. If it can be fairly presumed, from the generality

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of the language used, the nature and completeness of the new provisions adopted, or the incompatibility of the old and new enactments, that it was the intention of the legislature to substitute a new and entire system in lieu of and exclusive of the old one, the substituted provisions should then be construed in the same manner, as if in terms made exclusive.

Tried by these tests, I cannot concur in the opinion that no conveyance by a corporation can avail, unless made in conformity to the statute of 1815. The scope and object of the statute, as well as its title and language, clearly indicate, that it was not the purpose of the legislature to introduce any new and exclusive mode of conveyance, applicable to all corporations, or even to turnpike and manufacturing corporations. It begins by declaring the shares in those of the last named description to be personal property, and proceeds to designate the manner, in which they may be attached on *mesne process*, and sold on execution, as such. It points out the mode of proceeding, when no clerk exists, in case of non-payment of any tax, or assessment, authorizes the first named to hold land for the accommodation of toll-gatherers, imposes a penalty for taking excessive toll, or unreasonably delaying travellers, for defacing sign boards, injuring the road, &c., and concludes by requiring *said corporations* to keep records of their doings, designate the shares by numbers and the proprietors of each by name. Throughout, no allusion is made to any other description of corporation, except in the third section, designating the mode of conveying real estate, in which the words "turnpike, manufacturing, or *other private corporation*," are introduced. An additional statute, passed in 1817, provides a penalty for the neglect to appoint a clerk, and for refusal to exhibit by-laws and records; these additional provisions are confined entirely to the two kinds of corporation above named.

Many religious, eleemosynary, literary and other corporations had been created in this state before 1815, empowered to hold and convey lands; and many others have been created since. I apprehend it is contrary to reason and all sound principles of construction, to infer an intention to abrogate modes of conveyance theretofore recognized as valid in respect to these, from a loose general expression like the above, having no reference whatever to such corporations, but merely to certain specified corporations.

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I am of opinion, from these considerations, that all such bodies may still alienate their real estate in the same way and with the same formalities they could have done previously to 1815, unless, indeed, the clause in the recent Revised Statutes shall be construed as more comprehensive than the former statute. True, the Bennington Iron Company was a manufacturing corporation, and as such came within the scope of the statute of that year. But my object is not to prove that the mode indicated in the third section is not applicable to this case; it is only to shew, that it is not the exclusive one. It is a question of construction merely, and, as such, the fact, that in all other cases the legislature have left the law as it was, affords strong presumption against the exclusive character of the special enactment adverted to.

This point was not under consideration in the case of *Warner v. Mower et al.*, 11 Vt. 385. In the case of *Wheelock v. Moulton et al.*, 15 Vt. 519, it is indeed said, that, "by the law of this state corporations can only convey their lands and real estate by the deed of their president, reciting the vote of the corporation, authorizing the conveyance." The case, however, required no opinion of this kind. The important point decided by the court was, that a mortgage of all the shares in a corporation, by two individuals, being the sole owners thereof, could not operate as a mortgage of the real estate of the corporation, notwithstanding the shares were, in the mortgage deed, described to be land. Nothing can be clearer, than the distinction between the lands of such a body, owned by the association collectively, as real estate, and the shares in its capital stock, owned severally, by the individual members, which the statute of 1815 declares shall be considered, what in fact they were usually considered, independent of the statute, personal property. That the conclusion to which the court came, adverse to the claim asserted by the mortgagee, that such a conveyance operated as a mortgage of the lands of the company, was correct, it is difficult to doubt. Indeed, in the language of the learned judge who delivered the opinion in that case, it is past my comprehension, how it could ever have been suspected, that such a deed was intended to carry with it the real estate. This is all, that the case required to be decided. Whatever observations, therefore, fell from the judge in respect to the authority of the owners of all the shares to convey

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the corporate lands, or the manner in which the corporation could have conveyed them, whether by a corporate vote, recited in the deed, or without any such vote, whether under the corporate seal, or the seal of the president, was but the individual opinion of the judge, and is not regarded as authoritative. I do not, therefore, understand, that it has ever been judicially determined by this court, that corporations can convey their real estate in no other way, than that pointed out by the statute of 1815; and in these remarks my object has been to prevent my own concurrence in the judgment in the present case from being regarded as influenced at all by the reasoning on this point in the main opinion.

The important question with me has been, whether this mortgage could be sustained under the statute of 1797. That statute, which, as already said, is general in its terms, makes *signing and sealing* by the grantor essential to the validity of a deed. If done by an attorney, agent, or other person, in pursuance of competent authority from the principal, it is the same as if done by the latter. The corporation seal was affixed, as it is to be presumed, by competent authority; but the deed is not signed by it; the only signature purporting to be for the company is that of C. F. Hammond, chairman. There is no difficulty in complying with the statute in this respect. No doubt an agent must be constituted, either by deed, as before 1815, or by vote simply, under that statute. When so constituted, he can sign the corporate name,—as, "The Bennington Iron Company, by C. F. Hammond," or "C. F. Hammond, for The Bennington Iron Company." Either of these modes would answer. The deed must be that of the principal, and sealed with his seal. *Hulle v. Heightman*, 2 East 145. In the present case the corporate name is not affixed to the instrument by Hammond, or any other person. Signing as "Chairman" does not obviate the difficulty; for it is but *descriptive persona*. Nothing on the face of the deed goes to show, that the corporation had, in any manner, constituted Hammond their agent, or attorney, with power to execute the mortgage; he does not directly profess to execute it in their behalf. He seems to have assumed that his position as chairman dispensed with all this, and rendered his signature as such equivalent to affixing the corporate name. This was a fatal error, and neither the affixing

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the corporation seal, nor the statement, under oath, in the subsequent acknowledgment, can be regarded as supplying the deficiency.

Although there are authorities to the effect, that simply affixing a seal is tantamount to both signing and sealing, especially in respect to corporations, which were said to speak and could only speak by their common seal, the doctrine is antiquated and obsolete; and, if I am right in supposing that a corporation can at all make a deed of conveyance under the statute of 1797, every sound principle of construction forbids the idea, that, when both signing and sealing are expressly required, and both are equally practicable, one is to be understood as comprehending the other.

A similar objection lies against the acknowledgment, required in this case to uphold this mortgage against the antagonist claims of creditors. It is not acknowledged by any one assuming to act in behalf of the corporation, as the deed of the corporation, which it is, if anything. Whatever efficacy it may have as a conveyance of the shares, it can have none as a mortgage of the lands of the company.

On these grounds, mainly, I concur in denying to the orator a right to foreclose, as against those defendants, who have claims upon the mortgaged lands as attaching creditors. I am satisfied, also, that the deed, on the face of it, should carry some general statement of the nature of the authority and the character, or capacity, in which the agent assumes to make the conveyance. This may be by vote, by power of attorney, or other deed, empowering the agent to act in the matter. This deed purports, indeed, to be tripartite, one party being the corporation; but there is no statement of any fact, or circumstance, indicating, *prima facie*, that Hammond, or either of the other persons, whose names are affixed, was vested with authority to bind the corporation. The addition of "chairman" imports no such authority, any more than would the word director, clerk, stock-holder, member, or any other; for *non constat*, that such addition has anything to do with the right to sign and seal a deed for the company. Our registry system required, that, when a conveyance should be made by attorney, under a power, this latter instrument, as well as the conveyance, should be recorded. No inference on this point can be drawn from the fact stated, that all the stock-holders signed the deed. This was necessary, in order to

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convey their individual shares. Neither collectively nor separately do they profess to be clothed with the power to execute a deed for the corporate body.

Such acts of ratification subsequently, as are relied upon by the orator, whatever avail they may be of as between him and the corporation,—and no defence is here set up by the latter,—cannot be interposed, to turn aside the rights of the other defendants, even though they took place previous to the attachments, and though they were apparent on the corporate records.

In conclusion, I will remark, that, in considering the case in reference to the statute of 1815, I am unwilling to give so stringent a construction to the language of the third section, as has been given by the presiding judge. That the deed of the president, literally, under his own seal, reciting the vote, &c., will satisfy the terms of the statute, I am not disposed to question. A close adherence to the letter will, perhaps, justify such a conclusion. But I am far from thinking, that a deed of the corporation, under their seal, signed by the president, as such, for the corporation, and reciting the vote, would not equally carry out the intention of the legislature. Such would, in a sense, be as much the deed of the president, and a conveyance by him, as the other; inasmuch as his concurrence, in his official character, is required, to give validity to it. This view of the subject may be thought to receive some countenance from the phraseology employed in the late revision, which seems to have intended to extend the provision to all corporations, public, or private, and yet uses language, without apparent intention to depart from the previous provision, which clearly supposes the deed to be that of the corporation, through the intervention of the agent, authorized by vote, whether he be president, or some other person, either in or out of the corporation.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM.

FEBRUARY TERM, 1847.

PRESENT,

Hon. ISAAC F. REDFIELD,
Hon. DANIEL KELLOGG,
Hon. HILAND HALL,
Hon. CHARLES DAVIS. } ASSISTANT JUDGES.

JOSEPH DIX v. TOWN OF DUMMERSTON.

Under the Revised Statutes the selectmen of a town have power to submit to arbitration any such claims against the town, as they are, by the statute, authorized to audit and adjust; and the town will be bound by an award made in pursuance of such submission.

In this case a claim was preferred against a town for building a bridge, and the selectmen of the town agreed with the claimant, by writing under seal, to submit the matter to arbitration; and it was held, that the town was bound by the award made in pursuance of such submission.

DEBT on an award. The plaintiff alleged, in his declaration, that, certain difficulties having arisen between him and the town, in reference to a claim preferred by him against the town for build-

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ing a bridge in the highway district for which he was highway surveyor, the town, by their selectmen, and the plaintiff, by writing under seal, October 5, 1844, submitted the same to the arbitrament and final determination of Oscar L. Shafter, an arbitrator mutually chosen by the parties; that a hearing was duly had, and the arbitrator awarded, that the town should pay to the plaintiff \$142,07, and his cost, taxed at 18,63; and that the town had neglected to comply with the terms of the award. The defendants pleaded, among other pleas, that the submission was entered into by the selectmen of the town, without the authority, or consent, of the town, and that the town had never adopted or approved of the submission, or accepted the award. To this plea the plaintiff replied, that, at the annual March meeting of the town, holden in the year 1844, Martin Moore, John B. Miller and Asa Boyden were duly elected and chosen selectmen of the town for the year then next ensuing, with all the powers incident by law to that office, and that, by virtue of those powers, said Miller and Boyden did, for and in behalf of the town, make and sign the said submission, and submitted the said claim to arbitration, *absque hoc* that the said submission was made and entered into by the selectmen without the authority and consent of the town. To this replication the defendants demurred.

The county court, April Term, 1845,—WILLIAMS, Ch. J., presiding,—adjudged the replication sufficient; to which decision the defendants excepted;—and, the other issues having been determined in favor of the plaintiff, the case was passed to this court.

Bradley & Walker for defendants.

The powers of selectmen are derived wholly from the statute; and there is no pretence, that specific power is given to them to submit to arbitration any dispute, in which the town is interested. The only general power is given them in sect. 41, Chap. 13, of the Revised Statutes, which provides, that they shall have the general supervision of the concerns of the town. This is limited and defined by what follows in the same section; and this limitation was enacted after the decision in *Middlebury v. Rood*, 7 Vt. 125. The statute has also pointed out specific duties for selectmen. The only reasonable construction of the whole statute is, that, besides the power specially given, they have no power, except to cause all duties,

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required by law of towns and not committed to the care of any particular officer, to be duly executed. For if, in sect. 41, general power was intended to be given, the specific power afterwards given would have been needless. *Griswold v. N. Stonington*, 5 Conn. 367. *Middlebury v. Rood*, 7 Vt. 125. To refer a disputed claim is no duty; and if it were, it devolves upon the town agent, and is, therefore, by necessary implication, prohibited to the selectmen. Rev. St. 87, § 13. *Middlebury v. Rood*, 7 Vt. 125. *Buckland v. Conway*, 16 Mass. 396. This power cannot be inferred from the authority given to selectmen to audit and allow accounts against the town. They are made agents for this purpose, but with no power of substitution. That the legislature never intended that selectmen should have the general power of submission to arbitration is shown by the fact, that, in one particular instance, it has given them that power. Rev. St. 126, § 16. This court, in *Schoff v. Bloomfield*, 8 Vt. 472, held, that an agent, expressly authorized to compromise a claim, might refer it to arbitration. This decision is entirely consistent with the definition of the word *compromise*.

That the power to audit and allow accounts does not, in all instances, if in any, carry with it, by implication, the power to submit to arbitration is forcibly illustrated in the law of partnership. Partners have the right and power to bind each other by a release, by the compromise of a debt, by admissions of indebtedness, by settlements, and in various other ways. Yet they have no power to bind each other by submission to arbitration, either by the civil or common law. Com. Dig., Arbitrament D 2. Story on Part. 169, 172. Collyer on Part. 238, 260. *Hind v. Last*, 3. Bing. 101. *Karthaus v. Ferrer et al.*, 1 Pet. 221. *Buchanan v. Curry*, 19 Johns. 137. *McBride v. Hagan*, 1 Wend. 326. The reason seems to be, that partners have no implied authority, except so far as it is necessary to carry on the business of the firm, and that an authority to submit is not thus necessary, and that the exercise of such a power would go to deprive other partners of their legal rights and remedies in the ordinary courts of justice, without their consent. 3 Kent 149. Story on Part. 170.

These cases apply with much greater force in cases like the present. Whenever courts have been called upon to adjudicate in relation to the powers of selectmen, they have not been inclined to ex-

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tend them. In *Angel v. Pownal*, 3 Vt. 461, it was decided, that selectmen have not power to discharge the interest of a witness. In *Middlebury v. Rood*, 7 Vt. 125, it was decided, that selectmen could not receive money due to the town and discharge the debt. It would seem, that they cannot bind the town by admissions; *Spencer v. Overton*, 1 Day 323; nor by an accord; *Leavenworth v. Kingsbury*, 2 Day 183. And it has been expressly decided in Connecticut, under a statute similar to ours, but more unlimited, that selectmen could not bind the town by a submission and award; *Griswold v. N. Stonington*, 5 Conn. 367.

A Keyes for plaintiff.

It was decided in Connecticut, that selectmen had no power to commence suits, or submit the claims against the town to arbitration; *Griswold v. N. Stonington*, 5 Conn. 367; for the selectmen, as had been decided, had no power to settle claims against the town; *Leavenworth v. Kingsbury*, 2 Day 323. Immediately upon these decisions the legislature gave the selectmen the power to settle those claims; Rev. St. of Conn. 545. Undoubtedly such would have been the decision under our old statute; for that statute, authorizing the appointment of selectmen "to superintend the prudential affairs of the town," went on and specified their duties, but gave them no power to settle claims; *Middlebury v. Rood*, 7 Vt. 125; but that power is now expressly given by statute; Rev. St. 91, § 47. It was decided in *Schoff v. Bloomfield*, 8 Vt. 472, that a special agent, appointed to settle and compromise a claim against the town for damages by reason of laying a highway, might refer the same to arbitration. If an agent, appointed to settle a single claim, has this power, it is difficult to see why the selectmen, who are agents of the town to audit and settle all claims, should not have the same power. If they have the power to settle, they have such an agency in the claims for and against the town, that they can sue and defend; and if so, they can refer the same by rule of court, or submit to arbitration. *Buckland v. Conway*, 16 Mass. 396. *Boston v. Brazer*, 11 Mass. 447. *Schoff v. Bloomfield*, 8 Vt. 472.

The opinion of the court was delivered by
HALL, J. The only question made in this case was, whether the

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selectmen of the town, by virtue of their general power as such, had authority to make a submission to arbitrators of a claim of the plaintiff for building a bridge for the town.

In the case of *Angel v. Pownal*, 3 Vt. 461, and also in *Yuran v. Randolph*, 6 Vt. 369, it was held, that the selectmen could not, without a vote of the town, release the interest of a witness in a suit, so as to render him competent to testify; and in *Middlebury v. Rood*, 7 Vt. 125, it was held, that the selectmen, as such, had not authority to receive money collected on an execution in favor of the town and discharge the same. These decisions were, however, made under the provisions of the old statute, which merely authorized the selectmen to "superintend the prudential affairs of the town." Under a statute in Connecticut, somewhat similar, it appears to have been held, that the selectmen of a town had no authority to submit a claim against the town to arbitration; and it would be difficult, under such a general power, to find authority for making such a submission.

The Revised Statutes of this state have, however, greatly extended the powers of selectmen. By section 47 of chap. 13 they are empowered and directed "to audit, and, in their discretion, to allow, the claim of any person against the town *for money paid, or services performed*, for the town, and to draw orders on the treasurer for the sums so allowed." The claim of the plaintiff for services rendered the town in building a bridge was clearly one, which the selectmen had the power to audit and allow, as agents of the town, and bind the town to its payment.

In *Schoff v. Bloomfield*, 8 Vt. 472, it was held, that an agent, specially appointed by vote of the town to *compromise* a claim against the town for damages occasioned by the laying out of a highway, had authority to submit the claim to arbitration, and that the town was bound by the award of the arbitrators. It would be difficult, I apprehend, to maintain, that the selectmen have a more restricted authority, in regard to such claims as they have the power, in their discretion, to audit and allow, than had this special agent, in regard to the particular claim, which he was empowered to adjust. In fact, the principle of that case appears to be identical with this, and must, we think, govern its decision. If this power of the selectmen, which seems necessarily to result from their power of adjusting and

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allowing claims against the town, is found to be injurious to towns, the legislature can apply the remedy.

We do not intend to say, that selectmen have authority to submit all controversies of their towns to arbitration. Questions in regard to the settlement of pauper's claims, for damages for injuries occasioned by defective highways, and doubtless many others, would rest upon different grounds. In regard to such cases nothing is intended to be concluded. Our decision applies only to such claims, as the selectmen are authorized to audit and adjust.

The judgment of the county court is affirmed.



TOWN OF JAMAICA v. TOWN OF TOWNSHEND,

Where a person, residing in Jamaica, purchased a tract of land in another part of the town, and partly cleared it, and, with the intention of building a house upon the land and residing in it as soon as it should be finished, removed, with his family and all of his effects, except a few articles of furniture of little value, or use, to the town of Londonderry, and resided there twenty nine days, having no intention of again living in the house which he had left in Jamaica, and intending to remain in Londonderry until his house should be finished which he was about building, and then removed again to Jamaica, it was held, that this was a change of domicil and interrupted his gaining a settlement in Jamaica by residence.

APPEAL from an order of removal of Russell Clayton, a pauper, from Jamaica to Townshend, made by two justices of the peace in pursuance of the statute. Plea, that Townshend was not the place of the last legal settlement of the pauper, and trial by jury, April Term, 1846,—WILLIAMS, Ch. J., presiding.

On trial no question was made, but that the settlement of the pauper was in Townshend, unless he gained a settlement in Jamaica, by residence, between January 14, 1832, and March 9, 1840; and it was not denied, that he did gain such settlement in Jamaica, unless his residence there was legally interrupted between March 7, 1834, and April 5, 1834. In reference to this point evidence was

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given tending to prove, that prior to March 7, 1834, the pauper resided in Jamaica, and had bargained by parol for the right of occupying, and, on certain conditions, of buying twenty acres of woodland in the town, and that he had cleared, or partly cleared, an acre and a half of the land, and had cut some timber to be used in building a log house upon the land; that on the 7th day of March, 1834, he moved to Londonderry with his wife and family, taking with him all his furniture and implements of housekeeping, except a few small articles of little value, or use; and that he continued to reside in Londonderry, with his family and effects, until the fifth day of the following April, when he again removed to Jamaica. There was conflicting evidence as to the intention of the pauper, at that time, to make Londonderry his permanent home, or to return to Jamaica.

But the court charged the jury, that though the pauper had bargained for the land and managed the same as the evidence tended to prove, and though he had left at his former dwelling in Jamaica the articles mentioned, and though he cut some timber for a log house on said land, and though he intended speedily to build said house and return and live therein, yet, if he moved to Londonderry with his family and effects, as above stated, leaving no shelter, or dwelling, in existence in Jamaica, to which he intended to return, and intending, also, to remain in Londonderry until he built said house, that such a removal would interrupt his residence in Jamaica.

Verdict for plaintiffs. Exceptions by defendants.

W. C. Bradley for defendants.

The mere fact of the pauper's moving is not in itself conclusive. All facts of this nature merely go as evidence of intention to abide, or return; and so they have always been considered by the court,—as in relation to going to a place and staying there at school; 2 B. & A. 382; or a residence in any town for a temporary purpose; 3 Greenl. 13; and occasional absence, or going out of town for cure of sickness, or being hindered from returning thereby, does not interrupt gaining a settlement; *Paris v. Hiram*, 12 Mass. 265. In *Cambridge v. Charlestown*, 13 Mass. 503, the pauper came to the latter town from Vermont, where he had left his wife and children, and labored, with the intention of building and removing his family

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so soon as he should have acquired sufficient for that purpose; and it was held, that although, during the period, he visited his family in Vermont two or three weeks, and in one instance five or six months at a time, he gained a settlement on the ground of intention; —and this case is cited with approbation in *Burlington v. Calais*, 1 Vt. 385, where the court ruled, that, as the pauper intended living at Calais until he could go and find some other place, he was settled there. On the contrary, in *Billerica v. Chelmsford*, 10 Mass. 394, where a person left with his family, and admitted it to be *without any intention of returning*, but did come back in three months, it was held, that he gained no settlement. SEWELL, J., appropriately observed, that “where the change of place had been for the short period of three months in a period of ten years, (here it was twenty nine days in seven years,) it might be a question of fact, and *the result* of evidence, whether there was a change of the party’s home, or *domicil*, or merely an occasional absence from his home.” This is precisely what we contend ought to have been left to the jury. A man may have a temporary residence, or a permanent one; he may have a permanent or a temporary home; it depends upon whether he has reached his destination, or intends ultimately to proceed farther. The present case admits the latter intention.

Keyes and Bradley for plaintiffs.

The case finds the pauper, in March, 1834, with his family and effects, keeping house in Londonderry, without any shelter, or dwelling, any where else, to which he intended to return, but intending to continue where he was, until certain contingencies happened. We conceive that no *merely* mental operation, no mere volition, or plan for the future, can prevent the place so occupied from being his *present home*. To suppose otherwise would be a gross departure from the *ordinary* and popular use of the words *home* and *residence*; and there is quite as little in the etymology of the two words to favor the construction claimed by the defendants. Our construction comports with the obvious policy of the statute. If a man, while living in one town, can, by a mere mental operation, not directed to any particular “shelter; or dwelling,” *reside* in another, the duty of overseers would assume a new aspect. Rev. St. 102, § 4.

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The opinion of the court was delivered by REDFIELD, J. No doubt the question of residence, of domicil, is very much controlled by the *status* of the mind of the dweller, or inhabitant. But domicil is not a thing resting wholly in *intention*. If it were so, most Americans would be without any fixed domicil. Many of us have, perhaps, high hopes of a happier home, and comfort and plenty in some far off region, where all the necessaries of life grow spontaneously, almost, and where neither idleness, vice or dissipation, will cheat us of comfort and plenty. But all this effects no present change of domicil;—that is still the home, whether the removal is intended in twenty-nine days, or as many weeks, or years. In either case, it may never come.

So, in the present case, there is nothing, which shows that the pauper had not taken up his residence *for the time* (and that is all which is necessary) in Londonderry. Residence is a *fact*. Here the fact and the manner of dwelling is conceded; and the court charged the jury, that, in such a case, the intention to build a house and remove into it in the town of Jamaica did not constitute a residence in Jamaica. Is there any case, where such an *intention* will constitute a *residence*? I think not. When one leaves home, or leaves a former residence, the intention to return, the *animus revertendi*, will often prolong the virtual or legal residence, or domicil, when the actual *commorancy* may be, most of the time, in another place. Such are those occasional absences, which always occur in visits of business, or pleasure, when one's family attends him. Nor is it important, whether, during these temporary absences, the family board, or keep house, or whether the absence be for a few weeks, or many months, or years, even,—as occurs in the case of foreign ministers, and members of Congress, sometimes.

But in all these cases there is always some *place*, which the party does, or may justly, call *home*, some local habitation, which has a tangible, palpable existence, out of the mind of the party. I do not say this is *always* indispensable; but there must be something more than a mental purpose of return at some indefinite, future time.

Nothing of this kind exists in the present case. The statute in regard to paupers recognizes but two descriptions of persons, those who have "come to reside" in a town, and "transient persona."

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The one class, if they become chargeable, are subject to an order of removal ; the other class may be provided for, and the expenses recovered of the town, where the person is *settled*. Can there be any doubt to which class of persons this pauper belonged, while remaining within the limits of Londonderry ? How very much stronger is this case, in its facts, than that of *Middlebury v. Waltham*, 6 Vt. 200, where the pauper was a hired servant, who had come to Middlebury to labor for no definite time, and after four days, was taken sick and died ;—and yet she was considered *resident* and an order of removal necessary, to entitle the town to recover,—the court saying, “that all persons are to be considered either *residents*, or *transient persons* ; and perhaps visitors and travellers will comprehend most of the latter description ;” “those with families, who remove with them into a town,” &c., are residents.

And whether the residence is intended to be absolutely permanent, or not, is not important. The question is, where does he, for the time, dwell ? Is he now at home ? Where does he reside for the time being ? We never think of applying these terms to travellers, visitors, persons staying for education, for health, or for recreation. We all understand, that such persons are *away from home*, that they expect soon to return, or at some time. But in the present case it would seem the pauper never had resided upon the land, for which he had bargained ; he had permanently and voluntarily abandoned his former home, without any *animus revertendi*. But, so far as the mind was concerned, he was looking *forward*, instead of *back* ; his home in Jamaica, during this interval, was not a *remembrance*, but a *hope*, a *desire*. The mind may prolong a residence ; but it will hardly *anticipate* one, as is claimed here.

The question of the actual residence, in our opinion, would not have been very different in principle, if this piece of land had been in some third town. In that case few persons would dispute, that the pauper's residence, during the twenty-nine days, was in Londonderry. If this case were to be opened, it seems to us that it will not do to hold, that the stay in Londonderry is no residence, upon the mere ground of the intention to build a house and go to reside upon this land. If so, then all residences of the same, or similar, character, of whatever duration, must be so considered,—which will be absurd.

Judgment affirmed.

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**LUCIUS A. SMITH, Administrator of BARTHOLOMEW FULLER, v.
E. J. POLLARD.**

The effect of a quitclaim deed, in the common form, is to convey simply the right, title and interest, which the grantor then had in the land.

Nothing inserted in the *habendum* should be construed to extend the meaning of the terms used in the *premises*, or that part which precedes the *habendum*, —at least, if the language employed can be reconciled with the body of the deed.

In this case the deed was in the common form of a quitclaim deed, and the *habendum* was in these words,—“To have and to hold the *premises*, so that neither the said Alexis’ (the grantor) ‘nor any one claiming under him, should thereafter have claim, or right, to the *premises* aforesaid;’” and it was held, that it should be construed to have reference to such title and interest, only, as the grantor then had in the land; and that it would not estop him from subsequently acquiring and holding a superior right and title to the land from some other source.

EJECTMENT for lot No. 12 of the second range of lots in Grafton. Plea, the general issue, and trial by jury, May Term, 1845,—WILLIAMS, Ch. J., presiding.

On trial the plaintiff gave in evidence the plan of the town, by which it appeared, that the lot in question was divided to the right granted to the society for propagating the gospel in foreign parts; and also proved, that the town, in 1806, sold the lot to Bartholomew Fuller, who entered into possession of the same and paid the annual rent to the town. He also gave in evidence a deed of the same land from Fuller to Amos Davis, dated January 5, 1821; a deed of the same from Amos Davis to Joseph Davis, dated April 23, 1828; a power of attorney to sell the same, from Joseph Davis to Bartholomew Fuller, dated April 23, 1828; a deed of the same from Fuller, as agent of Joseph Davis, to Alexis Blood, dated July 26, 1830; a deed from Alexis Blood to Luther Blood, dated February 9, 1832; a mortgage deed of the same land from Luther Blood to Fuller, as agent of Joseph Davis, dated February 9, 1832, and the notes thereby secured; and proved that the defendant was in possession of the premises. It also appeared, that the several grantees, above mentioned, had paid the annual rent to the town from

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the time the town sold to Fuller through the year 1832; and that in 1833 the town, by their agents, duly authorized, abandoned and surrendered, by parol, to the society for propagating the gospel, all claims to the society lands in the town, and the society relinquished all claims to the rent which had accrued prior to that time.

The deed from Alexis Blood to Luther Blood, above mentioned, was in the common form of a quitclaim deed, describing the land in question, and the *habendum* was in these words;—"To have and to hold the premises, so that neither the said Alexis, nor any one claiming under him, should thereafter have claim, or right, to the premises aforesaid."

The defendant, to prove the issue upon his part, gave in evidence the charter and plan of the town of Grafton; the English statute incorporating the society for propagating the gospel in foreign parts; a power of attorney from that society to Daniel Chipman and others, authorizing them to lease the lands of the society in this State, with power of substitution; a power from these attorneys to Horace Baxter to lease these lands; a lease of the land in question from Baxter to Jonas Smith, dated June 3, 1833; an assignment of that lease from Smith to Alexis Blood, dated April 20, 1841; and an assignment of the lease from Alexis Blood to the defendant, dated March 19, 1842. It appeared, that Luther Blood was in possession of the lands from the date of the deed to him from Alexis Blood to the time when Smith assigned to Alexis Blood the lease above mentioned.

The court instructed the jury, that whatever title Alexis Blood acquired by the assignment, from Jonas Smith to him, of the lease above mentioned, accrued for the benefit of Luther Blood and his assigns, by virtue of the clauses of warranty in the deed from Alexis Blood to Luther Blood of February 9, 1832, and that, all the other deeds having been duly recorded, no title could pass to the defendant by virtue of the assignment to him, by Alexis Blood, of the lease; and the jury were directed to return a verdict for the plaintiff. Exceptions by defendant.

Keyes and Walker for defendant.

1. If the deed from Alexis Blood had professed to convey *the land*, and had been a warrantee deed, we admit the doctrine of es-

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toppels would apply;—but it seems to be admitted, that it applies only in case of warranty. *Foot et al. v. Emerson*, 10 Vt. 396, 346. *Blake et al. v. Tucker*, 12 Vt. 39, 44. 11 Johns. 91-97. 13 Johns. 316-320. *Allen v. Sayward*, 5 Greenl. 227.

2. It has been expressly laid down, as settled law, that, if the deed be a quitclaim, the doctrine of estoppels does not apply, and the subsequently acquired title does not enure, &c. Stearns on Real Actions 34. Shep. Touch. 182. Co. Lit. 446. *Jackson ex d. McCrackin v. Wright*, 14 Johns. 193. *Comstock v. Smith*, 13 Pick. 116. *Blanchard v. Brooks*, 12 Pick. 47. 4 Kent 99, n.

3. This is strictly a quitclaim deed, without any covenant of warranty whatever. 2 Bl. Com. 306. Shep. Touch. 184. None of the words are used, from which covenants are implied. There is no covenant real running with the land, for the *land* is not attempted to be conveyed, as it was in *Schillinger v. McCann*, 6 Greenl. 364; and the words here used are not so strong as in the case of *Comstock v. Smith*, 13 Pick. 116.

4. But if the court think this deed contains a covenant of warranty, it can only be of the estate attempted to be conveyed, which was not the *land*, but Blood's interest in the land. *Jackson v. Stevens*, 16 Johns. 110. Co. Lit. sec. 6. *Sumner v. Williams*, 8 Mass. 162, 174. The technical meaning of the word *premises*, in a deed of conveyance, embraces every thing previous to the *habendum*. Co. Lit. 66. 8 Mass. 162, 174. 2 Bl. Com. 298. 7 Petersd. 676. But the word *premises* has also a limited meaning, viz. the estate attempted to be conveyed; and that word is generally used in this limited sense,—and always, when it follows the words “*to have and to hold*.” Ib. It will be noticed, this supposed covenant of warranty does not follow the *habendum*, as covenants of warranty generally do, but is in the *habendum*, making a part thereof. The object of the *habendum* is to limit the estate conveyed and always has reference to it. It may lessen it, but seldom enlarges it. Ib. If, then, Alexis Blood meant to convey his *right* only, and not the *land*, and the *habendum* has always reference to what is *conveyed*, when he said “*to have and to hold the premises*,” he meant, to hold the *right* he had sold, but not the *land*, which he had not sold. And the word “*premises*,” in the latter part of the *habendum*, is used in the same sense; for he says “*the premises aforesaid*.”

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W. C. Bradley for plaintiff.

It is true, that, in this State, where a quitclaim deed is considered as a species of original conveyance of land, nothing more passes than the right of the grantor, unless there is some covenant, or warranty, to carry farther the effect of the deed; yet if there is a warranty, it shall bind to the extent thereof, as well in a deed of quitclaim as any other. Co. Lit. 265, § 446. *Goodtitle v. Morse*, 3 T. R. 370. *Jackson ex d. McCrackin, v. Wright*, 14 Johns. 193. *Jackson ex d. Weidman, v. Hubble*, 1 Cow. 646. *Henry v. Bell*, 5 Vt. 397. Here the whole case hinges on the word *premises*, as to the meaning of which, in deeds, there have been a great variety of decisions, growing out of the technical and popular senses of the word. 11 Co. 51. But the result seems to be, that, in general, the word *premises*,—"that which has been before mentioned;" Williams on Real Prop. 14;—extends to all that precedes the *habendum*; *Sumner v. Williams*, 8 Mass. 174; and that, in the application to particular parts thereof, regard must be had to the intention of the parties,—always observing, that, in cases of doubt, the inclination as to the construction of a deed poll is against the grantor. That it does not always refer to the mere extent of the grant is manifest from the cases; *Pembroke v. Syms*, Cro. Eliz. 782; but the land itself may be intended,—as we insist it was in the present case. For the premises are left unrestricted in the *habendum*. The grantee was to hold them in such manner, however capable of being expressed (*ita quod*) that Alexis neither should nor would *thereafter claim*, or demand, any *right* or title to the premises, or any part thereof. All this, as applied to the land, is of safe and easy construction, and we are to give, if possible, such effect, that every word may be made to operate in some way, or other. 2 Bl. Com. 380. But on the opposite construction the whole is unnecessary; because, having already granted his right and title, there was no occasion to stipulate that the grantor should not claim any right to his right, or any title to his title, or any part thereof, as there might be that he should not claim right or title to a distinct matter in the land itself; nor that he should be forever excluded and barred from such claim, he being already so by the simple grant.

It follows, that, if Alexis was barred, the clause extends to the present defendant, who comes under the description of a person

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claiming in his name, or behalf, which is tantamount to an assignee.
Butler v. Swinnerton, Cro. Jac. 657.

The opinion of the court was delivered by

DAVIS, J. It appears by the exceptions and the deeds therein referred to, that lot No. 12, in the second range of lots in Grafton, to recover which this action was brought, is a part of the right appropriated in the charter of the town to the society for propagating the gospel in foreign parts. This lot, as early as 1806, was *sold* (leased) by the town to Fuller, the plaintiff's intestate, in pursuance of the act of the legislature of October 30, 1794; and he took possession and paid rent for several years to the town. Several intermediate conveyances followed, terminating in a mortgage deed from Luther Blood to the plaintiff's intestate. In this chain of title there exists a deed from Alexis Blood to Luther Blood, dated February 9, 1832, upon the construction of which the whole case turns. On the other hand, the propagation society in England, having successfully asserted, by suit in the supreme court of the United States, their right to the lands originally granted to them, the lot in question was leased by H. Baxter, an agent of the society, June 3, 1833, to Jonas Smith, who afterwards assigned the lease to Alexis Blood, and Alexis Blood assigned to the defendant. From this statement of the matter it is evident, that the plaintiff's intestate acquired no valid title to the land by the original lease from the town, nor, consequently, by his mortgage deed from Luther Blood, inasmuch as the mortgagor's title was derived from that lease.

The plaintiff, however, insists, that, since Alexis Blood is found to be connected with both chains of title, he having by his deed of Feb. 9, 1832, conveyed this land to Luther Blood, the plaintiff's mortgagor, and he having also taken an assignment of the lease from Baxter, April 20, 1841, and then afterwards having assigned the same to the defendant, the latter, as well as Alexis Blood, are concluded, by estoppel, from setting up the title, thus acquired, against the defective title of the plaintiff.

It is admitted by the plaintiff, that, if the deed from Alexis Blood to Luther Blood is merely a quitclaim deed, without covenant of warranty, it will not have any such effect; while the opposite party admit, that, if it contained a general warranty, such as would enti-

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tie the grantee to recover damages on eviction, then the doctrine of estoppel might be applied, to prevent circuity of action.

It is admitted, too, that privies in estate are as directly affected by this principle, as the original parties, so that, if Alexis Blood would be estopped from holding, as against the plaintiff, the title acquired from the Propagation Society, the defendant, who is assignee of the Baxter lease, and consequently privy in estate, would be equally precluded from setting up his title in opposition to the plaintiff.

But there are several insuperable difficulties, in applying this principle to the present case, so as to enable the plaintiff to recover of the defendant. The deed, out of which the question arises, is plainly nothing but a quitclaim deed, conveying to his grantee simply the right, title and interest he then had in the land. The clause in, or following, the *habendum* is the usual clause, assuring the grantee that neither the grantor, nor any other person under him, would do any act inconsistent with the grant. This is the substance of the clause, or covenant, if it may be called such. Nothing here inserted should be construed to extend the meaning of the terms used in the *premises*,—or what precedes ;—at least, if the language employed can be reconciled with the body of the deed. In this case it can, as well as in the case of *Sumner v. Williams*, 8 Mass. 162, where an equity of redemption was conveyed, and covenants were added, that the grantors were seized of the *premises*, had good right to convey, &c. There was an attempt then, as here, to extend the words of the *habendum* and covenants, so as to convey the land. The question arose in determining the extent of the liability of the grantors on their covenants,—there being a recovery against the plaintiff under a paramount title. It was held, that the defendant should not be charged with the amount paid to get an assignment of a mortgage on the land and a release of a right of dower.

The word *premises* does, indeed, often mean the land; this is, in fact, the popular and ordinary acceptation, when the subject requires such a meaning to be attached to it. It is equally well adapted to designate the interest, or estate, intended to be conveyed. Here it can, and we think ought, to be construed to have reference to such title and interest, as the grantor then had, and not to exclude him from acquiring and holding a superior right and title, from some other source.

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As this disposes of the case, it is unnecessary to go at any length into other considerations, which arise from it. It seems clear, that the doctrine, for which the plaintiff's counsel contend, applies only in case of a general warranty of title against all persons, and not to those cases, where there exists a restricted warranty, confined to the grantor and his heirs and assigns. *Comstock v. Smith*, 13 Pick. 116, is a direct authority in point,—as it is also to the construction we have given to the language of the covenant.

This view of the subject renders it unnecessary to enter farther into what Lord Coke calls the curious learning of estoppels.

The judgment of the County Court is reversed and a new trial granted.



CALVIN WASHBURN, CHARLES A. WHITING, JOHN M. WASHBURN, THOMAS P. CUSHING, ARTHUR WILKINSON, CALVIN TOWNSLEY, CHARLES W. TOWNSLEY, JOSEPH STEEN, EUGENE W. PROUTY, EDWARD KIRKLAND, GARDNER C. HALL AND NATHANIEL CHENEY v. BANK OF BELLows FALLS, DAVID CRAWFORD, ZENAS SMITH, JOHN SMITH, LEAVITT H. ROBERTS, DANIEL HARRIS, JR., JOHN WATSON, SOLOMON HIGGINS, ASA LAWTON, CHANDLER PRATT AND GEORGE H. LAWTON.

[IN CHANCERY.]

In equity the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, notwithstanding the separate creditors may have first attached those assets.

In asserting this right the partnership creditors prevail over the separate creditors by virtue of a lien, which each partner is supposed to have, by implied contract, upon all the partnership effects, until all the partnership debts are paid.

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It is sufficient for the partnership creditors, in such case, to make out a *prima facie* case of insolvency; and, *per REDFIELD, J.*, if the defendants desire to have an account taken of the partnership dealings, so as to determine the exact state of the liabilities and assets, they must file a cross bill for that purpose.

The partnership creditors, having made separate successive attachments of the partnership property, and having resorted to a court of equity for relief against the attachments of the separate creditors, must share the assets *pro rata*, and not in the order of their attachments.

In this case it was held, that the defendants were justified, by former decisions made in this state, in contesting the case, and therefore no costs were allowed to the orators for the proceedings before the court of chancery; but, as the decision of the chancellor was reversed on appeal, it was held, that the orators were, as matter of right, entitled to their costs in this court.

APEAL from the court of chancery. The orators, who brought this bill as well in behalf of themselves as of such other creditors as might join with them, alleged, that the defendants Asa Lawton, Pratt and George H. Lawton had been partners in trade, doing business under the firm of A. Lawton & Co.; that the firm became indebted to the orators respectively, and the orators commenced suits at law against the firm and attached therein the partnership property, which suits were still pending; that the other defendants, except Roberts, were respectively creditors of individual members of the firm, and had also, prior to the orators' attachments, commenced suits at law for the recovery of their debts, and had attached therein the same partnership property which was afterwards attached by the orators, and were prosecuting their suits to judgment, with a view of levying their executions, when obtained, upon the same property; that the defendant Roberts was an authorized officer, and, as such, had served the defendants' writs, and now had in his possession the partnership property attached; that the firm was insolvent; and that the property attached was insufficient in amount for the payment of the debts of the partnership creditors and also of the separate creditors. And the orators prayed, that the partnership might be decreed to be dissolved, that an account might be taken of the assets and a receiver be appointed, that the funds might be applied, first, in payment of the debts due to the partnership creditors, in such order and proportion as they might be

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entitled to the same, and secondly, if any surplus remained, in payment of the debts due to the separate creditors, that the separate creditors might be enjoined from levying their executions, when obtained, upon the property, and that Roberts might be enjoined from parting with the property, except under the order and direction of the court of chancery.

The Bank of Bellows Falls answered, admitting that their debt was against Asa Lawton and one Black, and that they had attached thereon the partnership property of the firm of A. Lawton & Co., as alleged in the bill. The defendant John Smith deceased, and the bill was revived against his administrator, who appeared, and answered, that the debt due to his intestate was against Asa Lawton, and that the partnership property of A. Lawton & Co. had been attached thereon, as alleged in the bill ;—and both these defendants insisted, that they had good right to hold the property so attached, by reason of the priority of their attachments over those of the partnership creditors. As to the other defendants the bill was taken as confessed. The answers were traversed, and testimony was taken on the part of the orators, tending to prove the existence and insolvency of the firm, as alleged in the bill ; and the testimony on the part of the defendants tended to prove that a large portion of the capital stock of the firm was furnished by Asa Lawton.

The injunction prayed for was granted, and a receiver was appointed, who subsequently reported, that the assets of the firm, which had come to his hands and were subject to the order of the court, amounted to \$1302,29. It was admitted, that the attachment of the Bank of Bellows Falls was first upon the property in point of time, and that the amount due upon that debt was \$1591,34 ; and that the attachments of the defendants Crawford, Zenas Smith and John Smith, amounting in all to \$711,93, were also prior, in point of time, to the attachments of any of the partnership creditors. It was also admitted, that the whole amount of the debts due to the defendants from individual members of the firm, on which the partnership property was attached, was \$2452,23 ; and that the amount of debts due from the firm to the orators, on which the same property had been attached, was \$1328,77.

The court of chancery, November Term, 1844,—WILLIAMS, Ch.,—dismissed the bill ; from which decree the orators appealed.

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W. C. Bradley for orators.

The orators contend, that the funds in the hands of the receiver belonged to them, in preference to the creditors of the individual partners. It is not disputed, that the consideration of this question is not to be regarded by courts of law, and that, when the sheriff takes the partnership property on the attachment of a separate creditor, it is his duty to seize the whole and sell so much as is the proportion, in the firm, of the debtor partner, and that the purchaser will hold that undivided share in the property with the other owners, treating it as held in common. *Reed et al. v. Shephardson*, 2 Vt. 120. Such seems to have been the common law, as holden by Ld. Ch. J. HOLT in *Heydon v. Heydon*, 1 Salk. 392; 1 Wats. on Part. 98; and that courts of law, in departing from it, have not acted on sound principles seems to have been very clearly intimated by Ld. ELDON, in *Waters v. Taylor*, 1 Ves. & B. 301. Nor would there be any ground of complaint in equity, if the creditor, after such proceeding at law, left the firm solvent. *Williams ex parte*, 11 Ves. 3. But it cannot be denied, that courts of equity have always holden, that the creditors of a partnership, whenever it becomes necessary for the payment of their claims, have a right to be paid out of the property of the partnership, while it remains such, in preference to the creditors of the individual partners; Story on Part. 175, § 97; Ib. 470, § 326; Story on Eq. 625, § 675; Ib. 500, § 1253; for, from the formation of the partnership, the whole property of the firm is considered as a trust fund for carrying on the business, making the necessary purchases, paying incidental expenses, and, of course, incurring debts; and each partner is a trustee for the other, to do this in good faith and not apply the funds to his private benefit. 2 Story's Eq. 1243, 1253. Story on Part., §§ 97, 109, 128. *Egberts v. Wood*, 3 Paige 517. Nor does an attachment of the property at law alter the case; Story on Part. 373, 379, §§ 261-3, and notes; it stands good until an interference in equity,—and such is the manifest ground of the decision in *Reed et al. v. Shephardson*, 2 Vt. 120.

A. Keyes for defendants.

We admit, that the English law is against us upon the general principle, and that in some of the states it has been adopted, while

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others have held the contrary. But the English rule is not binding here.

1. It is contrary to the spirit of our collecting laws. The policy of the English law is to prevent attachments and build up large companies; and this is carried out through their bankrupt laws; and the whole action of their legislature aims at this equal distribution. The policy of our law is, "the first in diligence, the first in right." All our legislation in regard to collecting is based upon this principle. Even when general assignments began to be adopted, which tend to equal distribution, the legislature declared, that no general assignment should be valid. And we have a right to expect, that courts, as they always have done, will carry out that policy. By our attachment law a *lien* is formed by actual manucaption, which can never be disturbed by adverse process;—but in England no *lien* can be formed by attachment, or *f. fa.*, which will withstand their bankrupt law, which aims at equal distribution.

2. This rule is contrary to our whole experience and practice from the first organization of the state. It was supposed, after the case of *Reed et al. v. Shephardson*, 2 Vt. 120, was decided, that the matter was put to rest. The legislature, although they have frequently revised the attachment law, have never interfered with that decision, nor with the general practice in reference to the attachment of partnership property.

3. The reason of the rule in England has ceased to exist; and *Cessante ratione, cessat ipsa lex.*" If a system has grown up there, which cannot well be altered, notwithstanding the reason of that rule has ceased, surely, when the question is first presented here, "shall we adopt that rule?" We shall be slow to adopt it without reason. The reason for the rule, given by the courts, is, that all partnership effects and contracts are *joint*, but not *joint and several*. But in the case of *Devaynes v. Noble*, [1 Mer. 529,—S. C., 2 Rus. & Mylne 495,] the court of chancery decided, that partnership debts and funds were *joint and several*; and Judge Story says, [1 Story Eq. 626, that this is now the established doctrine, and then says, this being the case, "There seems no ground to make any difference whatsoever, in any case, between joint and several creditors, as to the payment out of the joint or separate funds. 1 Story's Eq. 626, note.

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4. But were we to adopt the English rule here, it furnishes, in the present case, no ground for relief. It has always been held, that the partnership creditors have no lien upon the partnership effects, and farther, that they have no equity, in their own right, in preference to the separate creditors, but that the joint creditors come in through the equity of the other partners; for the other partners generally have an equity to have the partnership funds pay the partnership debts. *Ex parte Rufin*, 6 Ves. 126. *Ex parte Williams*, 11 Ves. 3, 5, 6. 1 Story's Eq. 625. *Twiss v. Massey*, 1 Atk. 67. *Campbell v. Mullett*, 2 Swanst. 574. Such being the rule, the joint creditors can have no greater equity than the other partners had, and are not entitled to relief, when relief would be denied to the other partners, if they had brought the bill. But in this case Asa Lawton put in the whole capital stock, and the other partners none. By doing this he so far diminished his separate estate; and equity would seem to require, that those funds should first go to pay his separate debts.

The opinion of the court was delivered by

REDFIELD, J. This is a bill, brought by the creditors of a partnership, on the part of themselves and so many as may join in the suit, claiming a preference over the separate creditors of the partners, and that the latter may be restrained from levying upon the partnership effects, until the claims of the plaintiffs are satisfied. The Bellows Falls Bank is the first in the order of the attachments, and that and the other creditors of the separate partners are sufficient to absorb all the funds of the partnership, which have been reduced to cash by the receiver. The other separate creditors have attached subsequently to the bank; and the plaintiffs, who are partnership creditors, have also attached, subsequent to the bank and some other of the separate creditors. All these claims have gone into judgments, and the sum of the plaintiffs' claims, united, is also sufficient to absorb the partnership funds. So that the controversy in the present case is to the full extent of all the property attached.

No question can be reasonably made, I think, in regard to the failure and *utter insolvency of the partnership*, at the time of the first attachment by the bank, although there is some testimony in

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the case, going upon the basis of a very imperfect and unequal estimate of assets and liabilities, which would lead to the contrary result. The only real difficulty in this case is, to determine whether the partnership creditors are entitled to a preference over the separate creditors of the partners, in the distribution of the partnership funds. And this, I apprehend, could not now be esteemed a question of any difficulty, upon the principles of the English common law. By that law the separate creditors are indeed entitled to execution against the partnership property, but in that case can only sell the interest of that partner, against whom they have obtained judgment. As Lord Alvanley declares the law, in *Chapman v. Koops*, 3 B. & P. 289, "By the law of England the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and the purchaser will thereby become a tenant in common with the other partners." And the purchaser would not have a right to molest the other partners, until all accounts between them have been settled. But if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity against the vendee of the sheriff." Chancellor Kent (3 Com. 37) says, "The interest of each partner in the partnership property is his share in the surplus, after the partnership accounts are settled and all just claims satisfied." This doctrine is fully sustained by the English cases.

It follows, then, that while a partnership creditor may sell the entire interest in all the tangible property of the firm, the creditors of the separate partners can sell only the interest of that partner, which may be something, or nothing, as the concern shall prove solvent, or insolvent, on a final settlement of all its concerns. So that in this way the entire property of the partnership might be sold upon execution, against each separate partner, and still nothing accrue to any of the purchasers, since all must purchase subject to the claims of all the joint creditors. This, then, being the rule, it is useless to attempt to exclude the preference of joint creditors, since every sale, upon a separate execution, *must be made* subject to their claims. So that if this subject is put upon the basis of the English common law, the rights of the joint creditors are evidently preferred, even in a sale, upon execution, of the interest of the separate partners. It is evident, too, that, in ordinary cases, such a sale could

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not much avail the separate creditors and would not often be resorted to. And when it is done, it is always in the power of the other partners to resort to chancery, for the purpose of having a final account taken and the concern closed.

It is not, perhaps, very important to go into any abstract reasoning to show the grounds upon which this rule is founded, or its justice, or propriety. It is certain, that no rule in English jurisprudence is better settled. Almost every case upon the subject speaks of this rule as one long settled. Mr. Justice Story [1 Eq. Jurisp. 626, § 677] lays down the rule in regard to the right of separate creditors to sell only the interest of the partner, who is their debtor, after the final account shall be taken, almost in the same terms above quoted from Lord Alvanly's opinion in *Chapman v. Koops*, referring to *West v. Skip*, 1 Ves. 237, 239; *Barker v. Goodair*, 1 Ves. 85; *Dutton v. Morrison*, 17 Ves. 205; *Nicoll v. Mumford*, 4 Johns. Ch. R. 522; *Fox v. Hanbury*, Cowl. 445, and many others, in addition to those already cited,—most of which, more or less directly, involve that point, and all recognize it, as a well established rule upon the subject. This rule gives the creditors of the separate partners the power over the partnership effects, which their debtors themselves possess, that is, to control their own interest, which consists in what shall remain of their share, after all debts of the concern are liquidated. But in the following section of the same work, (pages 627 and following,) it is explicitly declared, that equity will interfere to restrain the sale of the interest of one of the partners, until that interest can be definitely ascertained; and that this injunction will be granted at the suit of the other partners, or the partnership creditors, or the debtor, whose share is levied upon; and that this will be done equally, whether the interest of the partner is seized by the sheriff, by the assignees in bankruptcy of the separate partner, by his assignee by contract, or by his executor or administrator. In the case of *Brewster v. Hammet*, 4 Conn. 540, such an injunction, at the suit of the other partners, they being also insolvent, was denied; but the general principle above stated was fully recognized, and likewise the right of the partnership creditors to maintain such a bill. See also *Taylor v. Field*, 4 Ves. 306, and note to Sumner's edition, and the other cases cited by Mr. Justice Story.

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It is indeed true, as declared by Lord Eldon, in *Waters v. Taylor*, 1 Ves. & B. 301, that the old law before the time of Lord Mansfield was somewhat different. Then, in a sale at law, the equities of the other partner were not regarded, but the aliquot proportion of the partner was disposed of by the sheriff, without regard to the ultimate balance; *Heydon v. Heydon*, 1 Salk. 392; *Jackey v. Butler*, 2 Ld. Raym. 871. The same rule at law is recognized in this state, so far as the rights of separate creditors at law are concerned. *Reed v. Shephardson*, 2 Vt. 120; *Clark v. Lyman*, 8 Vt. 20. But this rule at law was never intended to limit the equities of the other partners, or of the partnership creditors, but to refer them to a court of equity, as is said in *Chapman v. Koops*, 3 B. & P. 289 and in *Whitney v. Ladd*, 10 Vt. 165, and in *Clark v. Lyman*, 8 Vt. 290. The books are all so full to this point, that it seems needless farther to discuss it. It is found in all the English books, where the subject is named, and in most of the American States. *Pierce v. Jackson*, 6 Mass. 242; *Rice v. Austin*, 17 Ib. 197; *Wilson v. Corine*, 2 Johna. 282; *Tappan v. Blaisdell*, 5 N. H. 190; Remarks of Dewey, J., in *Allen v. Wells*, 22 Pick. 150; *Moody v. Payne*, 2 Johns. Ch. R. 548; *Burrall v. Acker*, 23 Wend. 606. This, too, is but the rule of the civil law upon this subject. 1 Story's Eq. Jur. 632. 1 Domat, B. 1, tit. 8, § 3, art. 10.

Unless, then, we are prepared to put the law of this state upon a different basis from the law of any other state, almost, upon this subject, we must recognize the right of these partnership creditors to be first paid. It is true, that they prevail here over the separate creditors by virtue of a lien, which each partner is supposed to have, by implied contract, upon all the partnership effects, until all the partnership debts are paid. This gives him an equity prior to that of the separate creditors; and it is only by calling this equity to their aid, that the partnership creditors are enabled to maintain their claims in this case. But this is not a new principle in equity, for one man to prevail in a suit, not by his own superior equity, but in consequence of that which resides primarily in some third party, who is indeed generally a necessary party to the bill. This is the case where a creditor claims to have the benefit of securities put in the hands of his debtor by some other debtor, the two debtors standing, perhaps, in the same relation to the creditor, but one being .

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principal and the other surety, as between themselves. So, too, in all cases where one holds funds, which are ultimately to go in a particular channel, equity will interfere on behalf of the party ultimately to be benefitted by such appropriation, notwithstanding he may not be a party to the original transaction. This is always more or less the case, where a court of equity interferes in marshalling assets.

But if it were necessary to test the soundness of this rule by the reason upon which it is founded, I should have no doubt of its prevailing. Mr. Justice Story seems [1 Eq. Jurisp. 626, in notes,] to apprehend, that the case of *Devaynes v. Noble*, [1 Merivale 529, before Sir William Grant, at the Rolls, S. C. on appeal before the Chancellor, Lord Brougham, 2 Russell & Mylne 495,] which recognizes a partnership contract as joint and several, and not joint only, has wholly subverted the principle, upon which any distinction has ever been made between joint and several creditors, as to their right to a preference in regard to joint and several funds.

I do not find any such doubts, in regard to the soundness or the continued existence of this right of preference of joint creditors in regard to joint funds, notwithstanding the case of *Devaynes v. Noble*, in any other book, except the one above referred to. And with all reasonable distrust of my own views, in consequence of the doubt there suggested, it still seems to me, that the difficulties of Mr. Justice Story are wholly without foundation, so far as the right of joint creditors to a preference is concerned. I take it to be a well established rule, in regard to the law of partnership, that all their contracts, so far as the creditors are concerned, are joint and several, binding each member for the whole debt, and that such is the general light in which partnership contracts have always been regarded. When such contracts have been spoken of as joint only, it has been with reference to bankrupt or insolvent laws, or the marshalling of assets in courts of equity, and not because the claims of the creditors and the obligations of the debtors were not several, as well as joint. The general rule, at law certainly, and in equity, unless it is controlled by an intervening insolvency, either of the partnership or some of the partners, is, most undoubtedly, that the partnership creditors have a right to go, not only against the joint, but also the separate, property of each partner, and may take their

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entire debt, either out of the estate of a deceased partner, or out of the property of a living partner, unless injustice is thereby likely to be done to others, in consequence of a burden, which *might* be made to rest either upon one, or the other, of two funds, being taken out of one fund, to the exclusion of other claims, which cannot be made to rest upon the other fund.

It is not meant here to assert, that a several suit may be maintained, at law, against one of the partners; for the contract is technically joint only,—but no more so than any other joint contract, which binds each contractor for the whole debt, or *in solidi* as it is termed. And when the death of one of the joint contractors intervenes, the entire debt may be taken out of his estate. The same is true as to the estate of a deceased partner. *Wilkinson v. Henderson*, 1 Mylne & Keene 582; *Devaynes v. Noble*, 1 Mer. 529; *Thorpe v. Jackson*, 2 Y. & Col. 553; *Braithwaite v. Britain*, 1 Keene 219 and note.

It is upon this very principle of the law of partnership, that each partner is bound for the *whole debt* of the partnership, and so, as to the share of the other partners, is virtually a surety, that a court of equity will suffer one partner to maintain a lien upon the partnership property, until he is released from such suretyship, when all the debts of the firm are paid. In this it is not perceived there is anything unjust, or unusual, so far as it regards separate creditors even. Nor is there anything singular, in enabling partnership creditors to enforce this lien, which is thus created upon the partnership funds in favor of the creditors of the partnership, although not created primarily for their benefit, but for the security of the other partners. This is but carrying out the most familiar principles of the law of principal and surety, as well between themselves, as between each and their common creditor. Authorities upon this point might be multiplied almost indefinitely, both in England and this country. This is the recognized and decided law of all the New England States, with the exception of Rhode Island, of which state we have no reports, and has been recognized there, we think, by the circuit court. Most of the other states have also recognized it; and no one has expressly denied its existence or obligation, so far as we know, with the exception of Pennsylvania and Georgia. The following cases may be named—in addition to those already cited: *Witter*

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v. *Richards*, 10 Conn. 37. *Egberts v. Wood*, 3 Paige 517. *Fereday et al. v. Wightwick et al.*; 5 Eng. Cond. Ch. R. 377; 1 Tomlyn, 250; S. C., 4 Eng. Cond. Ch. R. 317; 1 Russell & Mylne 45. *McCulloch v. Dashiell*, 1 Har. & Gill 96. *Hall v. Hall*, 2 M'Cord's Ch. R. 302. 2 Dessau. 270. *Woddrop v. Wards*, 3 Dessau. 203. *Smith v. Johnson*, 2 Edw. 28. *Commercial Bank v. Wilkins*, 9 Greenl. 28.

Arguments, which have been, or which may be, drawn from the possible or probable abuses of this rule, apply with equal force to other cases, where the same or analogous principles are recognized. It has long been settled, that the debtor has the right to prefer any of his creditors to any extent. He may do this even upon the eve of insolvency, unless expressly or impliedly restrained by some express statute, or by the general scope of the insolvent or bankrupt laws of the state. He may, too, at the time of contracting, as is often done, appropriate a portion of his estate, real, or personal, by mortgage, or pledge, to secure the fulfilment of that particular obligation. One may, too, appropriate a portion, or all, of his estate, unless restrained by express law, for the security of some one, who may have become, or is about to become, his surety. And in none of these cases will the rules of law, or equity, interpose any hindrance. And this property, thus set apart for the security of the surety merely, may, in case of the insolvency of the surety, be reached by the creditor, in a court of equity, before even the right of the surety to appropriate it attaches. In all this we see but an exemplification of that portion of the law of partnership which we have been discussing. And of this rule of law, by which a principal may assign property to secure his surety, or by which the creditor, in certain contingencies, may reach that property through an equity, which resides in another primarily, we hear no one complain. It has been supposed, too, that, if joint creditors have a preference as to joint funds and separate creditors as to separate funds, of which we do not speak now, there will be afforded great facilities for shifting funds from one portion of one's estate to the other, as may comport with the fancy or caprice of the debtors, more than with the just claims of the creditors. But this will always be the case, when any preferences are allowed to be made by debtors. It matters not how these preferences are to be effected by the debtors. They will be

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likely always to be unjustly exercised in many cases. The only effectual cure is to prohibit them altogether. But such a prohibition, to be effectual, must reach all mortgages and pledges; which would operate far too great an incumbrance upon the free spirit of commercial enterprise. Such a law could not be endured, probably, for any long time, especially in this age and country.

We think, therefore, that, in this case, the partnership creditors are entitled to a preference over the separate creditors, who first attached. The decree of the chancellor is therefore reversed, and the cause remanded to him, with directions to enter up a decree for the orators to be paid their debts out of the partnership funds, to the full extent, if the money in the hands of the receiver is sufficient for that purpose, and the residue, if any, to be paid to the creditors of the separate partners, until expended, in the order of their attachments; and if the funds in the hands of the receiver are not sufficient to pay all the orators' claims, then to be paid to them, in proportion to the amount of their demands, as far as it will go.

Something has been said, in argument, in regard to the uncertainty of the state of the proof as to the actual state of the funds of the partnership; and it is suggested, that possibly, if a full account of all the assets were taken, it might appear, that the concern was in fact solvent, and that there was no necessity for the plaintiffs to resort to this fund for payment. If that were so, doubtless the plaintiffs' bill must be dismissed. But if the defendants have any confidence in being benefitted by having such an account taken, they should have filed a cross bill for that purpose, and then the account could have been taken,—but at their expense. But where the plaintiffs are able, as they have done in this case, to make out a *prima facie* case of insolvency, we do not think they should be compelled to ask an account of all the partnership dealings, so as to determine the exact state of the liabilities and assets, and the precise interest of each partner,—which doubtless they might do, by making all the partners parties to the bill. And in ordinary cases the chancellor will exercise a discretion, whether to pass a decree for the orator, before this is done. But in the present case such indubitable proof of insolvency is already in the case, as to leave no reasonable doubt that such must be the fact, upon a final account. We do not therefore recommend the chancellor to subject the par-

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ties to that expense and delay, unless the defendants desire it, at their own expense.

It is possible the partnership creditors may think themselves entitled to full pay, in the order of their attachments; and so they would be by the Massachusetts law, when the partnership attachments defeat the attachment in favor of the separate creditors. *Pierce v. Jackson*, 6 Mass. 242. But at common law the attachment of the separate creditor is valid, so far as the interest of his debtor is concerned. And Chancellor Kent held, in *Moody v. Payne*, 2 Johns. Ch. R. 548, 549, that the sheriff could not be restrained, by injunction, from proceeding to sell the interest of the partner; but the contrary doctrine is now held. 1 Story's Eq. Jur. 629. *Skipp v. Harwood*, 2 Swanst. 586, 587. And as it is only by the aid of a court of equity that the orators can prevail, we think they must take the fund according to the rules which prevail in such courts, that is, that "equality is equity." For at law, in this state, the claim of the separate creditors is perfectly valid, to the full extent. *Reed v. Shephardson*, 2 Vt. 120.

Hitherto we do not think costs should be allowed the plaintiffs in the court of chancery, for the reason, that the defendants, from the decisions which had been made in this state, were fully justified in contesting the matter. In this court, as the plaintiffs have succeeded in reversing the decree of the court of chancery, they are entitled to costs, as matter of right. Future costs will be under the control and in the discretion of the chancellor.

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**OTIS BARDWELL v. GEORGE PERRY, PHILIP F. PERRY,
PERRY, JR., AND TISDALE PORTER.**

IN CHANCERY.

At law both separate and joint creditors of a partnership may attach either separate or joint property, and sell it upon execution in satisfaction of their judgments without regard to the equities of the debtors.

But in equity the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; and, while the partnership continues, this equitable lien, existing for the benefit and security of the separate partners, may be reached in a court of equity by the creditors of the firm, for the purpose of securing to themselves a preference over the separate creditors.

A partnership contract imposes precisely the same obligation upon each separate partner, that a sole and separate contract does; and there is no express or implied contract, resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively. All that the separate creditors can require, in equity, is, that the partnership creditors must first exhaust the partnership funds, before resorting to the separate effects of the individual partners; and beyond this both sets of creditors stand precisely equal, both at law and in equity.

It is no ground, in chancery, for postponing a prior to a subsequent attachment, that the second attaching creditor was induced to delay his attachment by being told, by the other creditor, that he had already attached the property, when in fact he had not, whereby he gained time and opportunity to put his attachment first upon the property.

In this case the defendants appealed from the decree of the chancellor, and the decree was reversed in this court; and no costs in the court of chancery were allowed to the defendants; but they were allowed their costs in this court, as matter of right.

APPEAL from the court of chancery. The orator alleged, in his bill, that, on the tenth day of October, 1842, one William Bellows was indebted to him, and that he sued out a writ of attachment against him, and placed the same in the hands of the defendant Porter, then constable of Athens, and caused to be attached thereon certain property which belonged to Bellows; that this suit was reg-

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ularly entered and was still pending in court; that Bellows and one Philip Peck had before that time been co-partners in trade under the firm of Philip Peck & Co., and, as such, were indebted to the defendants George Perry and Philip F. Perry; that these defendants also sued out a writ of attachment against the firm, and, knowing the intention of the orator to attach the property of Bellows in question, by fraudulently telling the orator that they had already attached the property, induced him to delay his attachment, and were thereby enabled to cause the same property to be attached upon their suit; that that writ was also served by the defendant Porter, and the suit had been entered in court, and judgment obtained, and the execution had been first placed in the hands of the defendant Gates Perry, Jr., and afterwards in the hands of Porter, and that Porter, who had previously sold the property upon mesne process, under the statute, had applied, or was about to apply the avails upon the execution; that Bellows and the firm of Philip Peck & Co. were wholly insolvent, and Peck and Bellows had been decreed bankrupts by the district court of the United States in the State of New Hampshire; and that the orator had no means whatever of collecting his debt against Bellows, except from the avails of the property in question. And the orator prayed, that Porter might be enjoined from applying the avails of the property upon the defendants' execution, or that, if he had already done so, the defendants George Perry and Philip F. Perry might be decreed to hold the same in trust, to be applied in payment of the separate debt of the orator, due from Bellows, in preference to the partnership debt due to them.

The defendants answered, denying the fraudulent representations alleged in the bill, and admitting the attachment of the property of Bellows upon a debt due from the firm of Philip Peck & Co., as alleged in the bill, and insisting upon their right, by virtue of the priority of their attachment, to have the property applied in payment of their debt.

The answers were traversed, and testimony was taken on the part of the orator, tending to prove that he sued out his writ of attachment, as alleged in his bill, and that he was about to have the same served by attaching the property in question, when he was informed by the defendants George Perry and Gates Perry, Jr., that they had already attached the property, when in fact it had not been

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attached, and that thereby the orator was induced to delay proceeding, so that the defendants were enabled to, and did, cause the property to be first attached upon their writ. It appeared, that the property had been sold by Porter, upon the writs of attachment, under the statute, and that, subsequently to the commencement of this suit, he had applied the avails upon the execution obtained by the defendants upon their demand. It also appeared, that both Bellows and Peck had been duly declared bankrupts.

The court of chancery decreed, that the defendants George Perry and Philip F. Perry should pay to the orator, by a time specified, the avails of the property in question, with costs, and that the defendants Gates Perry, Jr., and Porter should be dismissed without costs. From this decree the defendants appealed.

W. C. Bradley for orator.

The orator contends, that he is entitled to be satisfied out of the private effects attached in his suit, in preference to the partnership creditors. *Ex parte Elton*, 3 Ves. 240. Wata. on Part. 263. 1 Story's Eq. § 675. Story on Part. §§ 365, 376.

Besides, it is contended, that a priority, gained by the misrepresentation of the defendants as to their having already made an attachment, whereby the orator, to save fruitless expense, was induced at the time not to pursue his rights, cannot avail them. 1 Story's Eq. §§ 186-193. *Plymouth v. Windsor*, 7 Vt. 327.

Walker & Kellogg for defendants.

The question raised in this case is, whether the court will adopt the English rule, that in general, in case of copartnership, joint creditors shall first be paid out of the joint funds, and the separate creditors out of the separate funds of each partner.

Several reasons are given for this rule, none of which seem to apply with much force here. The principal one is that given by Lord Hardwick, in *Twiss v. Massey*, 1 Atk. 68, that the joint creditors give credit to the joint estate, and the separate creditors to the separate estate. Whatever may have been the case in England, at the time this rule was adopted, and whatever it may now be in purely commercial communities, *here* the reason has no force, and is false in fact. It is said, also, that the preference of the joint creditors to the

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joint fund is worked out through the equity of the partners. Story on Part. 133, 136, 501. Story's Eq. 625. *Ex parte Rufin*, 6 Ves. 119, 126. *Ex parte Kendall*, 17 Ves. 514. No satisfactory reasons are given for this doctrine; and it has been frequently characterized as purely artificial and having no foundation in natural justice. Indeed, partners should be the last to have any lien upon each other's effects. *Brewster v. Hammett*, 4 Conn. 540, 543. Another reason, given for the rule, is the promotion of trade, by keeping up the credit of trading companies. But, as this court has said in *Reed et al. v. Shephardson*, 2 Vt. 120, we have no motive to encourage partnerships, any more than individual business men.

The question, whether, at law, joint creditors should have a priority of payment over separate creditors out of the joint estate, was fully considered by this court in *Reed et al. v. Shephardson*, 2 Vt. 120. The cases of *King v. Sanderson*, Wightw. 50,—6 Excheq. R. 443,—*In re Smith*, 16 Johns. 102, *Church et al. v. Knox et al.*, 2 Conn. 514, 517, *Brewster et al. v. Hammett et al.*, 4 Ib. 540, *Barber v. Hartford Bank*, 9 Ib. 407, *Witter v. Richards*, 10 Ib. 37, and *Pierce v. Jackson*, 6 Mass. 242, which decide, that the separate creditor can only levy upon the interest of the individual partner in the goods, subject to the rights of the other partners and the debts of the firm, were pressed upon the court in that case; but they decided, that the partnership creditors were entitled to no such priority. And if this court do not follow the rule established at law in other states, why should they follow the *chancery* rule upon the subject?

But should the court see fit to adopt the rule, that joint creditors shall first be paid by the joint funds, we apprehend it by no means follows, that they will adopt the converse rule, that separate creditors are first to be paid from the separate fund. This principle, so far as it has been adopted at all, was adopted when it was the established doctrine of courts of equity, that debts against a co-partnership were joint, and not joint and several. Story on Part. 362, 514. Collyer on Part. 366. But it is now well settled, that such debts are several, as well as joint. Story on Part. 514. 1 Story's Eq. 626, n. *Devaynes v. Noble*, 1 Mer. 528, 564; 2 Russ. & Mylne 495. 13 Eng. Cond. Ch. R. 145. *Sumner v. Powell*, 2 Mer. 37. *Wilkinson v. Henderson*, 1 Mylne & K. 582; 7 Cond.

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Ch. R. 173. *Thorpe v. Jackson*, 2 Younge & Col. 553. This being so, we do not see why, upon principle, such debts should not, as against the several estates, be treated like other several debts. 1 Story's Eq. 526, n. Collyer on Part. 337. Story on Part. 540.

But the rule contended for is not only wrong in principle, but it is unjust and oppressive in practice. It has not been uniformly adhered to, and, in the emphatic language of Judge Story, rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of jurisprudence. Story on Part. 531, 541. It was adopted by Lord Hardwick, but broken in upon by Lord Thurlow, who allowed joint creditors to prove and take dividends under separate commissions. Gow on Part. 312, 314. Story on Part. 532, n. *Dutton v. Morrison*, 17 Ves. 207. It was restored by Lord Loughborough, and though followed by Lord Eldon, it was with great doubt as to its correctness. Story on Part. 538. *Ex parte Hill*, 5 B. & P. 191, n.

The unsatisfactory character of the rule in question is exemplified in the numerous exceptions to it, and the evident inclination of courts to increase those exceptions. Thus it is well settled, that, in case of a deceased partner, the joint creditor may proceed in equity directly against his estate, whether the survivors are bankrupts, or not; *Devaynes v. Noble* 1 Mer. 528; *Wilkinson v. Henderson*, 1 Mylne & K. 582; *Thorpe v. Jackson*, 2 Younge & Col. 553; and if there is no joint estate, then the joint creditors, in such case, are to be paid *pari passu* with separate creditors; *Cowell v. Sykes*, 2 Russ. 191; 3 Cond. Ch. R. 76; Collyer on Part. 528; *Wilder v. Keeler*, 3 Paige 167, 172. So in bankruptcy, if a joint creditor be a petitioner for a separate commission against the partner, he may share *pari passu* with the separate creditors; *Ex parte Crisp*, 1 Atk. 133; Story on Part. 538; Collyer on Part. 527. So, where there is no joint estate and no solvent partner; *Ex parte Hill*, 5 B. & P. 191, n.; *Ex parte Johnson*, 3 Madd. 229; Story on Part. 539, 540; Collyer on Part. 528. In *Payne v. Matthews*, 6 Paige 19-21, a surviving partner, who had paid joint debts out of his private funds, was allowed to claim from the estate of the deceased partner *pari passu* with the other creditors. And in Massachusetts the separate property of each member of a co-partnership is liable to be attached for the debts due from the firm; *Newman v. Bagley*, 16 Pick. 348; *Allen v. Wells* 22 Pick. 450.

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The opinion of the court was delivered by

REDFIELD, J. Having just now determined, in the case of *Washburn et al. v. Bellows Falls Bank et al.*, [*ante* p. 278,] that the partnership creditors are entitled to a preference in regard to partnership effects, it might be supposed to follow, almost as a matter of course, that the separate creditors are equally entitled to a preference, as to the separate funds. But upon examination it will be found there are many difficulties in coming to this conclusion. I propose first to examine this case upon principle, and then with reference to the decided cases bearing upon the subject.

I. Upon principle, it would follow, that the joint creditors, having a preference as to the partnership funds, might be compelled to resort to them, until they were exhausted. This would be done upon the familiar principle of marshalling assets, that, where one creditor had a claim upon two or more funds, and others only upon one of those funds, he should first be compelled to exhaust the fund upon which he only had a lien, or upon which he had the prior right, before resorting to the other, or else to assign, upon payment of his demand. Thus far there is no difficulty in the case.

But what shall be done, when there are no partnership funds, or when they are inadequate to liquidate the partnership debts? Can the partnership creditors, in such case, be wholly excluded from the separate estate, or postponed to the separate creditors? I confess, upon principle, it is difficult to view the matter in this light. There does not seem to me, upon principle, to be any ground whatever for the interference of a court of equity, in such case, beyond the point of requiring joint creditors to be confined to the joint fund, until that is exhausted. To this extent, no doubt, a court of equity should interfere. Beyond this, it seems to me, that whatever power they have exercised in England, in giving a preference to separate creditors, as to separate funds, has been, either upon the mere ground of the English bankrupt laws, or else upon the mistaken ground, that a partnership creditor has no separate and entire claim upon the individual responsibility of each partner, for his whole debt; the latter of which grounds is sufficiently examined in the case just decided, and the former ground can have no application here. All that is said in the case of *Washburn et al. v. Bellows Falls Bank et al.* as to the reason, upon which the preference

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of joint creditors is founded, shows, I think, or tends to show, very fully, that no such right of preference does or can exist in favor of separate creditors, as to the separate estate of their debtors, upon general principles of equity, certainly, beyond the extent named above.

II. But we must examine the cases; and if any such right of preference is found to exist, upon general principles of equity, the separate creditors must here enjoy it, notwithstanding it is difficult to see the grounds upon which it rests. It seems to me, that some confusion upon this subject might be saved by a clear perception and definition of the reasons, upon which the preference is allowed to joint creditors, or partnership creditors, as to partnership funds. If that preference is allowed solely upon the ground, that it is a part of the law of partnership, that all funds invested in the business, and acquired by it, are, by an implication of the very law of the association, pledged, firstly, for the payment of all the partnership debts, and that the interest of the separate partners is only a share in what remains after all the liabilities of the concern are liquidated, it is obvious that no such reason exists for giving a preference to separate creditors in regard to the separate estate. The contract of the partnership makes no pledge, or appropriation, of the separate property exclusively to separate debts. It is indeed expected, that the separate property will not be required for the payment of the partnership debts; and it is a part of the contract of partnership, that the separate funds will not be liable, until all the partnership funds are exhausted; and thus far equity can justly interfere, and no farther, it seems to me, upon this ground alone. Beyond this point the separate estate of each partner is bound to the same extent for partnership as for any other debts. It is the debt of each partner, *in solido*; *Jenkins v. De Groot*, 1 Caine's Cas. 122, 1804, in a very sensible opinion by Thompson, J.; *Gray v. Chiswell*, 9 Ves. 118; *Devaynes v. Noble*, 1 Mer. 529; *S. C.*, before the chancellor, 2 Russ. & Mylne 495; and many other cases, some of which are referred to by Mr. Justice Story, [1 Eq. Jurisp. 626, and note 1.]

But the case of *Gray v. Chiswell*, while it distinctly recognizes the partnership debts, as imposing upon each partner the obligation of full payment, expressly determines, that the separate creditors are entitled to be first paid out of the separate estate. This is the first

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case, says Lord Eldon, where, in chancery, this point has been distinctly presented and decided, although the question in bankruptcy was familiar. And the question seems here to be viewed as one of great doubt and difficulty. And this decision seems to result from the bankrupt laws, by which the joint claim is postponed, until after all separate debts are paid. And this rule is, by the chancellor, adopted, finally, upon the ground, mainly, it would seem, that the same rule should prevail in chancery as in bankruptcy,—which in England, as is well known, is really under the control of the chancellor also. Since that time this rule has been repeatedly, and almost constantly, recognized in the English chancery, but without much farther investigation. Before that time it had been constantly vacillating, upon the kindred subject of the right of partnership creditors to prove their debts, under a separate commission, against one partner. The history of this subject is fully and clearly stated by the chancellor, in *Murray v. Murray*, 5 Johns. Ch. R. 60. Lord Thurlow, in *Ex parte Hodgson*, 2 Brown's Ch. R. 5, established the rule in bankruptcy, even, that a joint creditor might prove his debt under a separate commission, and receive a dividend *pari passu* with the separate creditors. This rule was acted upon during all the time of Lord Thurlow, and until reversed and put back upon the ground established by Lord Hardwick, by Lord Loughborough, in *Ex parte Elton*, 3 Ves. 238. See this subject succinctly stated by Lord Eldon, in *Ex parte Clay*, 6 Ves. 814. But the numerous exceptions, which have been engrafted upon this rule, even in bankruptcy, and the unsettled state of the practice in regard to it in England, show very fully to my mind, that, in principle, it rests upon no satisfactory basis; certainly not upon the principles of general equity.

1. In the case of *Sadler & Jackson ex parte*, 15 Ves. 52, it is decided, that joint creditors may prove their debt, under a separate commission, for the purpose of receiving dividends *pari passu* with the separate creditors, there being no joint estate or solvent partner. This shows, very clearly, that the rule itself rests upon no absolute equity. If it were so, an exception could not be admitted upon a ground, which, for every purpose except the bankrupt laws, subverts the rule itself. And accordingly it is held, that if there be a solvent partner, the joint creditor cannot prove under the separate commis-

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sion. *Kensington ex parte*, 14 Ves. 447. And in *Ex parte Pinckerton*, in note to *Ex parte Clay*, the chancellor allowed a joint creditor to prove his debt under a separate commission, there being no joint property, but a solvent partner, who was abroad and not expected to return; Lord Eldon constantly remarking, in almost all the cases which came before him upon this subject, in substance, as he did here in terms, "Whatever be thought of the settled rule, he should adhere to it, on account of the mischief arising from shaking settled rules; but he observed, that it seemed very singular, that the nature of the debt should turn upon the fact, whether there is joint property, or not." This contains a distinct admission, by so discriminating and cautious a judge as Lord Eldon, that the rule, as administered in bankruptcy, rested upon no rational basis.

2. Another exception, which obtains in England under the statutes of bankruptcy, is, that a partnership creditor may be a petitioning creditor for a separate commission against one of the partners, and, being so, is entitled to a dividend with the separate creditors. I have not examined the English bankrupt statutes, and this rule may be based upon them mainly; but whether so, or not, it evidently subverts all equity, or principle, upon which the rule may be supposed to rest in a court of equity.

3. Another mode, in which the English court of chancery have dispensed with this rule, shows very clearly, I think, that no confidence in its justice is there felt. It is now, I consider, a settled rule, in the English chancery, to treat all joint bonds as several also, upon the ground of a supposed mistake in the execution of them, where there is not positive proof, out of the contract itself, that it was positively the intention of the parties to the bond, that it should be joint and not several. This practice is treated as a virtual reforming of the deed, upon the ground, merely, that the parties must have intended to bind all the signers for the whole debt, and equally. *Thomas v. Frazer*, 3 Ves. 399; *Gray v. Chiswell, ubi supra*; *Burn v. Burn*, 3 Ves. 573; *Thorpe v. Jackson*, 2 Y. & C. 553; *Wilkinson v. Henderson*, 1 Mylne & Keene 582. And although courts of equity may sometimes have applied this same rule of intendment to other cases, it is certain, that its application here must have been intended to get rid of the application of that rule of distribution of separate estate, which would work manifest injustice, if applied.

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But thus to save the necessity of infringing an absurd general rule, by what, in others, would be deemed scarcely less than a palpable evasion, can never be very creditable to a court of justice. It would be more dignified, and more consistent with a just regard to truth, to abrogate the rule.

In the case of *Tucker v. Oxley*, 5 Cranch 34, which was the case of a partnership creditor during the existence of the first U. S. bankrupt law, the supreme court of the United States held, that partnership creditors were entitled to prove their debts, for the purpose of receiving a dividend, under a separate commission, and that equity alone could restrain such joint creditor. The reasoning of so distinguished a jurist and judge as Ch. J. Marshall, in this case, fully shows, that he esteemed the partnership obligation precisely the same upon each partner, that any separate individual contract was, and that equity could only restrain the joint creditors, until they had exhausted the joint fund; and that then they must, even in equity, come in for the balance, the same as other creditors of the separate partners.

This view of the case is still more strongly confirmed by the doubts of Mr. Justice Story (in 1 Eq. Jur. 626, note,) whether the case of *Devaynes v. Noble* had not in fact abolished all ground of preference between joint and several creditors. We think it clearly has, so far as the separate property of the partners is concerned, and that this is an universal principle of the law merchant, or of the law of partnership, which is a department of that law. But the right of the partnership creditors to a preference, in regard to partnership funds, rests upon a different basis, as we have attempted to show in the case of *Washburn et al. v. Bellows Falls Bank et al.* Hence we conclude, that this rule, giving the separate creditors the exclusive right to the separate property of the partners, until their debts are paid, is merely a rule of convenience for the distribution of funds, under the English bankrupt laws, and that it has no foundation in general equity. In saying this we are not unmindful, that Chancellor Kent, in the late edition of his Commentaries, [3 Kent 65, 66, and notes,] still adheres to the opposite rule, and that he is supported by many respectable American cases, which are cited by him, some more and some less in point. But we understand, that the entire distinction between separate and partnership creditors,

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even as to partnership funds, is disregarded in Pennsylvania and in Georgia. *Bell v. Newman*, 5 Serg. & R. 78; 1 Ashmead 347; *Ex parte Stebbins & Mason*, R. M. Charlton 77. And although no case, perhaps, has taken precisely the ground here adopted, we still think it the only ground, which can be maintained upon general principles of equity.

In this particular case, there being no joint estate or solvent partner, the orators could not exclude the defendants from a share in the separate estate of each partner, even under the English bankrupt laws. The parties, therefore, standing precisely equal in point of equity, and the defendants having first attached, and thereby gained a prior right at law, must be permitted to pursue it. And so far as this particular case is concerned, we pursue precisely the English rule, since the case of *Devaynes v. Noble*. But the English courts held this doctrine to be an exception to the general and only rule of equity.

We have said nothing upon the ground, alleged in the bill, of the fraud attempted by the defendants, in representing that they had attached the goods before they in fact had; for we did not suppose the orator seriously expected to prevail upon that ground; that was just such a falsehood as he might have expected, and to put confidence in such an assertion was his own folly. I have said nothing of the argument for the preference in this case, which is sometimes used, that the separate creditors have given credit to the separate property and the joint creditors to the joint property, for the reason that there is no truth in any such assumption.

(The result of all the decisions in the state upon this subject now is;) 1, That, at law, both separate and joint creditors may attack either separate or joint property, and sell it upon execution in satisfaction of their judgments, without regard to the equities of the debtors;—2, That in equity, by the very law of partnership, the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; but that this lien is solely under the control of the partners; and it would follow, doubtless, that if the partnership be dissolved and the effects assigned to one partner, this pledge, or lien, is gone,—as was held in *Ex parte Rufin*, 6 Ves. 119; but that, while the partnership continues, this equitable lien, existing for the benefit and security of the separate

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partners, may be reached in a court of equity by the creditors, as the only mode of fully carrying into effect the stipulations of the parties at the time of forming the association ;—3, That a partnership contract imposes precisely the same obligation upon each separate partner, that a sole and separate contract does, and that it is not true, that, in joint contracts, the creditor looks to the credit of the joint estate, and the separate creditor to that of the separate estate ; and that there is no express or implied contract resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively ; but that, as the partnership creditors, in equity, have a prior lien upon the partnership funds, chancery will compel them to exhaust that remedy before resorting to the separate estate ;—but that, beyond this, both sets of creditors stand precisely equal, both at law and in equity.)

The decree in this case must be reversed, and the following mandate sent to the court of chancery. “The bill of *Bardwell v. Perry et al.*, must therefore be dismissed in the court of chancery, there being no joint estate out of which the plaintiffs can be compelled to take their satisfaction ; but we recommend to the chancellor, that no costs be allowed the defendants, in the court of chancery.” In this court they are entitled to their costs, as matter of right.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR.
FEBRUARY TERM, 1847.

PRESIDENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG, } ASSISTANT JUDGES.
HON. CHARLES DAVIS. }

EPHRAIM INGRAHAM, JR., v. AARON P. LELAND AND CHARLES EDMUNDS.

The deciding whether, or not, a proper officer can seasonably be had to serve process, and giving authority to some person, not a public officer, to serve it, if the fact be found negatively, is a judicial act.

If an attorney make a writ and indorse his name upon it as attorney for the plaintiff, and also sign the writ as justice of the peace, and, for want of a proper officer seasonably to be had, direct the writ to an indifferent person, by whom it is served, the process will abate.

There is no distinction, in this state, between being "of counsel" and "attorney" in a case; and therefore the plea in abatement is sufficient, in such case, if it allege, that the magistrate, who signed the writ, "was then and there an attorney of record in said suit."

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And where it is alleged, in such plea, that the writ was served by the person thus specially authorized, and the writ and return are referred to in the plea, it is sufficient, although it is not alleged, that the writ was not served by any other person.

And if the attorney, who makes the writ, signs it as justice of the peace and takes a recognizance for costs, this will be a judicial act, which will render the process abateable. DAVIS, J.

ASSUMPSIT upon a promissory note. The original writ was signed by I. B. Person, as justice of the peace, and a recognizance for costs was taken by him in common form, and the writ, for want of a proper officer, seasonably to be had, was directed to Silas Bruce, Jr., an indifferent person, to serve and return; and the return showed that it was served by Bruce by attaching real and personal property of the defendants. The writ was indorsed "Stoughton & Person, Att'ys." The suit was entered in court, and the defendant Leland appeared and pleaded in abatement, "that the service of said writ upon this defendant was made by Silas Bruce, Jr., an indifferent person, and not by a regular officer authorized by law to serve and return other processes, and that the authorization of said Bruce was signed by I. B. Person, a justice of the peace, as appears by said writ on file in this court, who was then and there an attorney of record in said suit with Henry E. Stoughton, under the name and firm of Stoughton & Person." To this plea the plaintiff demurred.

The county court, November Term, 1844,—HEBARD, J., presiding,—adjudged the plea sufficient; to which decision the plaintiff excepted.

Stoughton & Person for plaintiff.

The same powers are given to a justice, in his county, to sign writs, as are given to a clerk of the county court; Rev. St. c. 28, § 3; and by Rev. St. c. 28, § 7, the same authority is given to a justice, to authorize indifferent persons to serve writs, as is given to a clerk or judge of the county court;—and as to these there are no exceptions, either as to relationship, or interest; 9 Vt. 166. We insist, that sect. 7 of chap. 28 is as clearly without exceptions as sect. 3 of the same chapter, from which a justice derives his authority to issue writs returnable to the county court. The statute, in-

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sisted upon as an exception in this case,—Rev. St. c. 26, § 10,—relates entirely to cases where the justice is to take cognizance. The justice, in signing county court writs and deputing persons to serve them, is an instrument in the hands of the court, for the purpose of bringing cases before them for their adjudication.

We insist, that the plea is defective,—1, Because it is not alleged that the writ was not served in any other manner, than that set forth in the plea; 9 Vt. 349;—2, Because it does not allege, that the justice had been of counsel; the allegation, that the justice “was then and there an attorney of record,” is insufficient.

A. A. Nicholson for defendant.

1. The statute provides, that “No justice shall take cognizance of any cause,” &c., “or do any judicial act,” where “he shall have been of counsel” in the case. Rev. St. 170, § 10. The deputation of a person, not an officer, to serve and return a writ is a *judicial act*, within the meaning of the statute. *Kellogg ex parte*, 6 Vt. 509. Rev. St. 171, § 22.

2. The plea is sufficient, in averring that the justice was “attorney of record” in the case. The words “counsel” and “attorney” are technically synonymous in this state. Rev. St. 161, § 12. 14 Vt. 565.

The opinion of the court was delivered by

DAVIS, J. This action was originally commenced to the county court at the November Term, 1844. The writ was signed by I. B. Person, Justice of the Peace, and was directed in the usual form to Silas Bruce, Jr., an indifferent person, to serve and return, for the want of a proper officer seasonably to be had, and was served by him on the defendants, by attaching certain personal and real estate. The names of Stoughton & Person, attorneys, were endorsed on the back of the writ, as attorneys for the plaintiffs. The defendant, at the first term of the court at which the action was entered, filed a plea in abatement, averring the facts above stated as to the direction and service of the writ. To this plea the plaintiffs demurred; and the only question in the case is, whether an attorney in the suit, being a justice of the peace, had authority to direct it to an indifferent person; for if he had not, it was not legally served, and the process would abate for that cause.

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The words of the statute, on which the defendant relies, so far as material to this question, are, "No justice shall take cognizance of any cause, or do any judicial act, where he shall have been of counsel in such cause, or matter." Is the official act of deciding whether, or not, a proper officer can be seasonably had to serve the process, and giving authority to some person, not a public officer, to serve it, if the fact be found negatively, a judicial act, within the true intent and meaning of the statute? We have no doubt it is so. Indeed, this point, has been several times expressly decided by this court. *Kellogg ex parte*, 6 Vt. 509.

Does, then, the justice, whose name, in connection with that of his partner, Stoughton, appears endorsed on the writ as attorney, stand in the predicament of having been of counsel in the cause, within the meaning of the statute? Of this there seems as little room to doubt.

There is no distinction here between being counsel and attorney in a cause. Our statute attaches the same meaning to the phrase "being of counsel," which popular usage attaches to it, that of being concerned in a cause, or having charge of it as attorney. It was sufficient, therefore, to allege in the plea, that the magistrate was an attorney of record; it is equivalent to saying he was of counsel.

It is farther insisted, in support of the demurrer, that the plea is defective, in not negativing the fact of the writ having been served by some other person. And the case of *Pearson v. French*, 9 Vt. 349, is referred to, in support of this objection. It will be found, however, that the cases are clearly distinguishable. Here, the writ and return are referred to in the plea; in that case they were not. One, among many other objections to that pléa, was, that it insisted on certain defects in the copy of the writ left with the defendant, but contained no averment, that the defective copy was the only one left, and none that it was not served in any other manner. Those were matters that might, perhaps, be well presumed to exist, and therefore ought to have been negatived. Here the objection is to the legal competency of the person, to whom the writ was directed, to serve it. It was not necessary to negative the service by any other person.

The plea in this case relies wholly upon the adjudication of the magistrate, as to the fact of a regular officer being seasonably to be

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had, and the consequent official direction to Bruce, as an indifferent person. Had it brought into view the fact of signing the writ and taking a recognizance for costs, there is, I apprehend, no reason to doubt, that these acts are equally within the prohibition of the statute in question, and would have been followed by the same consequences.

The judgment of the county court is affirmed.

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CUMMINGS & MANNING v. LEVI GASSETT.

A writing in these words,—“For value received of Cummings & Manning, or order, thirty dollars and eighty three cents on demand and interest annually,” signed by the defendant, is competent and sufficient evidence under a count for money had and received.

And it seems, that such writing would be sufficient evidence under (a count declaring upon it as a promissory note in common form)

A memorandum on the margin of such note, specifying certain items of property at certain sums, the sum total of which, as added together, was equal to the sum on face of the note, cannot be treated as part of the note, for the purpose of showing that the consideration was other than money.

A promise to pay, as soon as the debtor can, a note barred by the statute of limitations is sufficient to take it out of the statute; it is not necessary for the plaintiff to show that the defendant is of sufficient ability to pay the note, in order to entitle him to recover.

ASSUMPSIT upon a promissory note, in common form, with a count for money had and received. Pleas, the general issue and the statute of limitations. The plaintiff replied a new promise. Trial by jury, November T. 1844.—HEBARD, J., presiding.

On trial the plaintiff offered in evidence a written instrument, signed by the defendant, in these words:—“Ludlow, Dec. 11, 1833. “For value received of Cummings & Manning, or order, thirty dollars and eighty three cents on demand and interest annually. “(Signed) Levi Gassett.” Below the signature was a memorandum in these words,—“To be paid in one year from date.” On the

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margin was a memorandum, as follows,—“Stove \$26,00; Pipe \$1,-\$8; Yarn, \$1,70; Oil \$1,25;” and the whole was added together, making \$30,83. To the admission of this instrument in evidence the defendant objected; but the objection was overruled by the court.

Under the replication to the plea of the statute of limitations the plaintiff called a witness, who testified, that the note in suit came into his hands for collection in 1837; that in the latter part of the summer, or fall, of 1838, he saw the defendant and spoke to him about the note; that the defendant told him he had no money, but asked him if he would take sheep; that the witness at first hesitated, but finally told the defendant he would take sheep; but that the defendant did not say, that he would, or would not, let the witness have the sheep;—that again, in 1841, the defendant spoke to the witness about the note, and told him that he did not wish to be sued, that it was as much as he could do to pay the debt, without paying costs, and “that he would pay it as soon as he could.”

The court instructed the jury, that, if the testimony was believed, they must return a verdict for the plaintiffs.

Verdict for plaintiffs. Exceptions by defendant.

C. French and Tracy & Converse for defendant.

We conclude that the count upon the promissory note is abandoned by the plaintiffs, and that they seek to recover on the count for money had and received.

1. To sustain that count the plaintiffs must prove, that the defendant has actually received *money* to their use; it is not sufficient, that he has received *money's worth*. Chit. on Cont. 602–604. *Beardsley v. Root*, 11 Johns. 464. *Shephard v. Palmer*, 6 Conn. 95. *Burnap v. Partridge*, 3 Vt. 144. *Nightingale v. Devisme*, 5 Burr. 2589. *Maxwell v. Jamieson*, 2 B. & Ald. 51. *Rodgers v. Kelley*, 2 Camp. 123. *Dey v. Murray*, 9 Johns. 171. 17 Mass. 563, 579. 14 Mass. 400. If the instrument offered in evidence is not a promissory note, and cannot be declared on as such, for its uncertainty, it is void for all purposes, and cannot be admitted to sustain the count for money had and received. It comes within the doctrine established by the cases of *Brown v. Bebee*, 1 D. Ch. 227, and *Wainwright et al. v. Straw et al.*, 15 Vt. 215.

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2. The instrument itself contains evidence, in the memorandum upon the margin, that it was not given for money, but for goods. If received at all, it should have been given to the jury, with instructions, that if, from inspection, they found it was given for goods, and not for money, the plaintiff could not recover.

3. The bar of the statute of limitations is not removed by the new promise proved. Recent decisions require, for that purpose, that the promise shall be unqualified. *Phelps v. Stewart*, 12 Vt. 256. *Cross v. Conner*, 14 Vt. 394.

P. T. Washburn and R. Washburn for plaintiffs.

1. The note offered in evidence was properly received under the special count. An *ambiguity*, to avoid a written instrument, must be such as to render it wholly devoid of meaning, or equally capable of several different constructions. Chit. on Cont. 104. 2 Stark. Ev. 1000. The note, in this case, contains an acknowledgment of *value* received, of the *amount* received, of *whom* received, and *when* that note is to become due. No person can look at it and give it any other construction, than as a promise to *pay* \$30.83 on demand. But the memorandum at the bottom of the note is part of the note; *Fletcher v. Blodgett*, 16 Vt. 26; *Heywood v. Perrin*, 10 Pick. 228; and that supplies, by the words "to be paid," every omission in the body of the note.

2. But, at least, the note was admissible under the count for money had and received. *Edgell v. Stanford*, 6 Vt. 551. The *memoranda* at the *side* of the note are no part of it, as those *memoranda*, only, are so considered, which contain "an important qualification of the contract." *Fletcher v. Blodgett*, 16 Vt. 26. *Exon v. Russell*, 4 M. & S. 505. *Williams v. Waring*, 10 B. & C. 2, [21 E. C. L. 5, 11.] *Stone v. Metcalf*, 1 Stark. 53, [2 E. C. L. 292.] *Pierce v. Butler*, 14 Mass. 303. Bayl. on Bills 35, n. (a,) 36, n. (b.) *Sanders v. Bacon*, 8 Johns. 379. Therefore the court cannot infer, from these *memoranda*, that the note was executed for any other consideration than *cash*.

3. The facts shown are amply sufficient to take the case out of the statute of limitations. An unqualified *acknowledgment* of the debt, with no avowed intention not to remain liable for it, is sufficient in this state; Royce, J., in *Phelps v. Stewart et al.*, 12 Vt.

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263; and a promise to pay, whether absolute, or *conditional* does necessarily include an acknowledgment of the debt; TINDAL, Ch. J., in *Hayden v. Williams*, 7 Bing. 163, [20 E. C. L. 86.] The doctrine, which obtained in England prior to the coming in force of the statute of 9 Geo. 4, c. 14, requiring the plaintiff, in case of a *conditional* promise, to prove the condition, has never obtained in this state and is at variance with the distinct rule adopted by this court, while it follows, as a natural consequence, from other doctrines of the English courts, which have never been adopted here. In this state, in the case of *Gailer v. Grinnell*, 2 Aik. 349, this court held, that, in case of an *acknowledgment* of the debt within six years before suit brought, the plaintiff recovered, not on the ground of having a new right of action, but because the statute bar is removed. And in *Barlow v. Bellamy*, 7 Vt. 54, COLLAMER, J., says, that this point is too far settled to admit of discussion. But in England it is held, that the promise, which takes a case out of the statute, constitutes a *new cause of action*. BEST, Ch. J., in *A'Court v. Cross*, 3 Bing. 329, [11 E. C. L. 126.] GASELEE, J., in *Scales v. Jacob*, 3 Bing. 698, [13 E. C. L. 88.] TENTERDEN, Ch. J., in *Tanner v. Smart*, 6 B. & C. 603, [13 E. C. L. 274.] GASELEE, J., in *Gould v. Shirley*, 2 M. & P. 581, [17 E. C. L. 221.] *Hayden v. Williams*, 7 Bing. 163, [20 E. C. L. 86.] The result of this doctrine is, that the new cause of action must be shown by the declaration, and that, if the plaintiff counts upon an *absolute* promise, it is not supported by proof of a *conditional* agreement,—a result which cannot follow here, where the only effect of a new promise is to revive and draw down the *original liability*. So in this state it has been established, that an unqualified *acknowledgment* of the debt is all that is necessary. *Phelps v. Stewart et al.*, 12 Vt. 263. *Blake et al. v. Parleman*, 13 Vt. 576. *Adm'r's of Chapin v. Wardner*, 15 Vt. 563. *Minkler v. Estate of Minkler*, 16 Vt. 196. *Williams v. Finney*, 16 Vt. 299. But in England, at the time when the decisions requiring the *conditions*, attached to conditional promises, to be complied with were made, an *acknowledgment* alone, however definite, was not held sufficient to take the case out of the statute. *A'Court v. Cross*, 3 Bing. 329. *Tanner v. Smart*, 6 B. & C. 603. *Gould v. Shirley*, 2 M. & P. 581. *Hayden v. Williams*, 7 Bing. 163. Hence, requiring an *express promise*

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to be made, it followed, as a natural consequence, that the promise made must be taken according to its terms, and that, if conditional, the condition must be regarded.

The opinion of the court was delivered by

REDFIELD, J. 1. Not to spend time upon the other views taken of this case in argument, we think it very obvious, that this writing, defective as it confessedly is, did express, with proper certainty, that the defendant had *received money* of the plaintiffs to the amount of \$30,83, for which he was liable to them; and if so, the proper action was assumpsit for money had and received.

2. But, if it were necessary, it seems to me it would not be very difficult to supply the omission in this note by intendment. There is but one way, in which it can be supplied; no two persons would think differently in regard to that. In such cases, it seems to me, courts should, if they do not choose to stultify themselves in the estimation of all common sense men, supply the defect; and I have no doubt we should, in this case, if it were necessary.

3. It is very questionable, whether the *memoranda* upon the note come within any decided case of controlling the other part of the contract. The one at the bottom is in favor of the payee, and might therefore have been placed there for the very purpose of supplying the defect in the note. The one upon the margin is quite too uncertain to be relied upon to determine the *consideration* of the note. It raises no such suspicion, except from the *coincidence of sums*; and that might have happened from other reasons. It was merely placed there to aid the memory of some one, in regard to some subject; and that it was not intended to form part of the note is very obvious.

4. The testimony in regard to the statute of limitations seemed to be all, that has been required in this state for many years. The rule upon that subject has been too often stated to be here repeated.

Judgment affirmed.

Foster v. Deming et al.

THOMAS R. FOSTER v. RILEY A. DEMING AND ALBERT ONION.

Where the defendants made a general assignment of their property for the benefit of their creditors, and some of the creditors, among whom was the plaintiff, agreed, in writing, to receive the dividends which might accrue to them "after a faithful accounting by the assignees, and await the same," and it appeared, that, prior to the commencement of this suit, the surviving assignee had notified the creditors, that he was ready to pay a dividend of twenty five *per cent.* upon their claims, and that that was all he could pay, and more than they would be entitled to receive upon a strict accounting, and it did not appear upon what basis the dividend was thus declared, nor that there was any fraud, nor that any more was retained by the assignee than reasonable compensation for his services and expenses, it was held, that this was substantially an *accounting*, within the meaning of the agreement signed by the plaintiff, and that the plaintiff was entitled to sustain an action upon his original claim against the assignors.

And it was also held, that it made no difference, in such case, that the plaintiff refused, before the commencement of his suit, to receive the dividend thus declared by the assignee, it appearing that he received it after the suit was commenced, and that it was deducted from the amount of his claim in making up the judgment.

And it was also held, that the temporary bar of the plaintiff's right to sue, created by the agreement signed by him, was removed by an unnecessary and unreasonable delay, on the part of the assignee, to render his account and declare a dividend.

ASSUMPSIT upon three promissory notes, signed by the defendants, by the name of their firm of Riley A. Deming & Co., and made payable to Wellington, Foster & Co., or order,—of which firm the plaintiff was a member,—and by them endorsed to the plaintiff. Onion was discharged, at a former term, upon his plea in bankruptcy. Plea, by Deming, the general issue, and trial by jury, March Term, 1845,—HEBARD, J., presiding.

On trial, the plaintiff having given in evidence the notes declared upon, the defendant, to support the issue upon his part, gave in evidence a general assignment, by Deming and Onion, of all their property, to Oramel Hutchinson and Carlos L. Onion, in trust for the benefit of the creditors of the firm of R. A. Deming & Co., and of the individual partners, executed January 21, 1840, and an agree-

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ment in writing, appended thereto, which was in these words,—“We hereby accept of the provision made for us in the foregoing assignment, and agree to receive the dividends which may accrue to us after a faithful accounting by the said assignees, and await the same.” This agreement was signed by a number of the creditors of Deming and Onion, and, among others, by Wellington, Foster & Co., by their authorized agent,—they being then the owners of the notes now in suit. The defendant also gave evidence tending to prove, that the assignees had not accounted, either with the assignors, or the creditors, at the commencement of this suit.

The plaintiff then gave evidence tending to prove, that Hutchinson,—the other assignee having deceased,—notified the creditors named in the assignment, more than six months before the commencement of this suit, that he was ready to pay a dividend of twenty five cents on the dollar of their claims, and that that was all he could pay, and more than they were entitled to under a strict accounting; that some of the creditors had accepted the dividend thus offered; that the plaintiff, when offered the dividend upon the claim in suit, declined accepting it;—but it appeared that the plaintiff, since the commencement of this suit, had received from Hutchinson the dividend thus offered, amounting to \$157,13, and had given to him a receipt therefor, purporting to be “in full for dividend” on the claim in suit. The defendant also gave evidence tending to prove, that a reasonable time had elapsed, before the commencement of this suit, for the assignee to close up the business and render his account, and that he had delayed, for an unreasonable time, to do so.

The defendant requested the court to charge the jury, that, if they found there had been no accounting between the assignees and assignors, the defendant was entitled to recover; and that, if Hutchinson notified the plaintiff, that he was ready to pay twenty five cents on the dollar of his claim, as a dividend, and the plaintiff refused to receive it, as such, and denied the correctness of the assignee’s accounts, and afterwards, after the commencement of this suit, he did have an accounting with the assignee and receive his dividend and discharge the assignee, the defendant was entitled to recover, and that without reference to the question of reasonable time for rendering the account.

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But the court instructed the jury, that the plaintiff, by the terms of his agreement was bound to wait until the assignee had reasonable time to make sale of the property and collect the debts and ascertain the amount that he could pay to the several creditors upon their claims; and that, if that was done, so that he had ascertained the amount to be paid to the creditors out of the property and effects assigned to him, and he had given notice to the creditors accordingly, the plaintiff was entitled to recover, although there had not been a formal accounting between the assignors and assignee, and although the plaintiff, when the dividend was thus offered to him, declined to receive it, and although the plaintiff had accepted the dividend, since the commencement of this suit.

The jury were also instructed, that, if the assignee had not accounted, and had not ascertained and declared his dividend before the commencement of this suit, still, if he had delayed and neglected to do so unnecessarily, and an unreasonable time, the plaintiff was entitled to a verdict.

Verdict for plaintiff, for the amount of the three notes, deducting the amount received by the plaintiff from the assignee subsequent to the commencement of this suit. Exceptions by defendant.

Richardson & Nicholson, for defendant, relied upon the case of *Kingsbury v. Deming et al.*, 17 Vt. 367, n.

Washburn & Marsh and *L. Adams* for plaintiff, cited *Bank of Bellows Falls v. Deming et al.*, 17 Vt. 366, and *Kingsbury v. Deming et al.*, Ib. 367, n.

The opinion of the court was delivered by

DAVIS, J. The circumstances of this case are the same as those of *Kingsbury v. Deming et al.*, stated in a note to the case of *Bank of Bellows Falls v. Deming et al.*, 17 Vt. 367, except that in the present case a dividend of twenty five cents on the dollar had been ascertained and declared by the surviving assignee, and the plaintiff was notified thereof and refused to accept it,—on what ground does not appear; but, after the commencement of this suit, he thought better of the matter and did receive his share. Several years, too, had elapsed, since the commencement of Kingsbury's suit. These circumstances materially change the aspect of the case.

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There was no formal accounting, on the part of the assignee, either with the creditors or the assignors. Whether the dividend of twenty five cents was declared upon a full collection and conversion into cash of the assets placed in his hands does not appear. If it was so, and no more than a reasonable compensation for services and expenses was deducted from the fund, and no fraud appeared, it would substantially amount to an accounting, within the meaning of the contract between the parties. The ceremony of a formal accounting would be of no importance.

Nothing in the case shows, that any farther delay was necessary in suing for the balance. The refusal to accept and apply the portion of the fund, to which the plaintiff was entitled, could of course have no effect on his right to sue. Eventually the amount was received, and accounted for in making up the damages.

This, however, seems not to have been the ground, on which the case was put in the county court. We perceive, nevertheless, no error in the instructions that court gave to the jury. If farther assets remained to be liquidated, and a formal accounting, even, were necessary, it was in strict accordance with the ground, on which the case of *Kingsbury v. Deming et al.* was determined, to refer it to the jury to say, whether, under the circumstances, a reasonable time had elapsed, to enable the assignee to do all that was necessary to a perfect accounting; and, if it had been unreasonably delayed, the plaintiff would not be obliged to wait longer, but might commence his suit.

The judgment of the county court is affirmed.

Onion v. Fullerton.

HORACE ONION v. NATHANIEL FULLERTON.

A defendant, who has been discharged upon his plea of bankruptcy, is a competent witness for the plaintiff, in the same case, against his co-defendant, unless interested; and it makes no difference, that the plaintiff consented to his discharge.

Where the action, in such case, was for money had and received, and the defendant, who was called as a witness by the plaintiff, after having been discharged upon his plea in bankruptcy, testified, that he had been in partnership with his co-defendant, and that, at the request of his co-defendant, he borrowed of the plaintiff, for the use of the firm, the money which the plaintiff claimed to recover in this action, and that he informed the plaintiff, at the time, that he was obtaining the money for the firm, it was held, that this disclosed no interest in the witness, which should exclude his testimony from the consideration of the jury.

ASSUMPSIT for money had and received and money paid. Plea, the general issue, and trial by jury, March Term, 1845,—HEBARD, J., presiding.

The action was originally brought against the defendant and one Albert Onion, as partners. On trial, the plaintiff offered Albert Onion as a witness; to whose admission the defendant objected. The plaintiff then produced Albert Onion's discharge in bankruptcy, and also the docket minutes of the court, by which it appeared, that he had been discharged from the suit, upon his plea in bankruptcy, at a former term of the court. The defendant still objected to the admission of the witness; but the objection was overruled by the court.

The testimony of Albert Onion tended to prove, that, in the years 1838 and 1839, he was in partnership with the defendant in the manufacture of cotton warps; that about the first of May, 1839, and while they thus remained partners, they had partnership payments to make, and among the rest was a note, which was given for the mill, in which they carried on their business, and which was a debt for the partnership to pay, although the deed was taken to them in their individual capacities, and not as partners, and the note was signed by them with their individual names, and not as partners; that about the first of May, 1839, at the request of the defendant, he

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borrowed of the plaintiff \$195, which was applied and paid out for the partnership, either in payment of the note given for the mill, or of other debts of the firm; and that he borrowed the money, at the time, upon the credit of the firm. There was testimony in the case, which tended to prove that the plaintiff was informed, when the money was borrowed, that it was wanted for the purpose of paying the note given for the mill.

The defendant offered to prove, that, when Albert Onion filed his plea of bankruptcy in this suit, the plaintiff consented to his discharge upon the plea; to which testimony the plaintiff objected, and it was excluded by the court.

The defendant requested the court to charge the jury, that, if they found that the money was borrowed for the purpose of paying the note given for the mill, and that that fact was known to the plaintiff at the time, he could not recover in this action,—which was brought against Fullerton and Albert Onion, as partners. But the court charged the jury, that the plaintiff would be entitled to recover, if they found that the money was lent on the credit and for the use of the firm; and that, if the money was borrowed to pay the note given for the mill, it would make no difference, provided they should find that it was the duty of the firm to pay that note.

The jury returned a verdict for the plaintiff. Exceptions by defendant.

L. Adams, Stoughton & Person and *Tracy & Converse* for defendant. Albert Onion was improperly admitted as a witness. The case shows, that he received all the money demanded in this suit; and there was evidence tending to show that the plaintiff was informed, at the time of lending the money, that it was wanted for the purpose of paying the note given for the mill. It therefore became necessary for the jury, under the charge of the court, to find the existence of the partnership, and that it was the duty of the partners to pay that note in their partnership capacity.

We insist, then, that the effect of the testimony is, to throw upon the defendant one half of the debt; Collyer on Part. 460, n.; 1 Cow. & H. Notes 111; 2 Ib. 1520, 1549, 1554. 13 Pick. 125-128; 6 Gill & J. 358. Even an agent, when he is *prima facie* liable, is not a witness for the plaintiff; 4 Day 60; 4 Mass. 653; 8 Cow. 60;

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25 Wend. 456. The discharge in bankruptcy does not render him competent; he still has an interest to increase the fund in the hands of his assignee, and cannot be admitted, unless proper releases are executed; 1 Cow. & H. Notes 112, 136, 144, 145; 4 Phil. Ev. 353; 2 B. & C. 14; 1 Cowp. 70; 6 Bing. 306; *Ripley v. Thompson*, 12 Moore 55; 22 E. C. L. 433; Owen on Bank. 272, 273; 3 D. & R. 215; 2 T. R. 496.

The court erred in rejecting the evidence offered by the defendant, to show that the plaintiff consented to have the witness discharged on his plea in bankruptcy; 3 C. & P. 372; 1 Cow. & H. Notes 145.

Richardson & Nicholson for plaintiff.

1. We might insist, that the witness Onion had a right to waive his privilege and testify, if called by the plaintiff, even if he had not been discharged by the previous proceedings in the case; *Mordan v. Williams*, 1 Taunt. 377; *Fenn v. Granger*, 3 Camp. 177; *Worrell v. Jones*, 7 Bing. 395; 1 Phil. Ev. 149; *Coles et al. v. Whitteman et al.*, 10 Conn. 121. But it is perfectly clear, that, there having been a previous judgment in the case in his favor, upon a plea of bankruptcy, he ceased to have any interest in the suit, and was a competent witness for the plaintiff; *Willing et al. v. Consequa*, 1 Pet. R. 307; *Doe d. Hanop v. Green*, 4 Esp. R. 198; *Mc Iver v. Humble*, 16 East. 171; 3 Stark. Ev. 1063; and whether the judgment was by consent or by compulsion is wholly immaterial.

The opinion of the court was delivered by

DAVIS, J. Since the severance of Albert Onion from this suit in consequence of his discharge and certificate in bankruptcy, no obstacle exists to his admission as a witness for the plaintiff, unless on the ground of interest. The alleged consent of the plaintiff to the severance under the plea is of no consequence. The plea being regular and true, as is to be presumed, he could not well do otherwise than consent.

It is urged on the part of the defendant, that the witness, by charging Fullerton as a co-partner, relieves the surplus fund in the hands of the assignee from one half the amount of this debt, whereas it would otherwise be chargeable with the whole. The argument

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assumes the liability of the witness for the whole debt, unless a partnership be established, so as to throw half of it upon the defendant. It is a sufficient answer to this argument, that, so far as the case shows, when the objection was taken, no such liability appeared. For aught that appears by the exceptions, Albert Onion was the first and only witness, on whom the plaintiff relied to prove his whole case. His interest was manifestly adverse to the facts sought to be proved, because the surplus fund, if any, might become chargeable for one half the amount, which the defendant should be called upon to pay in debt and costs. No preliminary inquiries under the *voir dire* were made, in order to lay a foundation for the objection, and no facts were shewn *aliunde*, tending to the same result. Considering the time and manner of raising the objection, it was necessary to determine it, irrespective altogether of the purport of the witness' testimony, as subsequently delivered. In this point of view, the decision of the county court, in admitting him to testify, was clearly right.

It might have been presented in a different form; that is, after the testimony had been given in, the defendant might have requested the court to instruct the jury to lay his testimony out of the case, on the ground, that, taking it all together he had placed himself in the attitude of an interested witness. This is the proper course, whenever the objection rests upon the facts disclosed by the narrative given, and not upon such as exist independently of it. Had the objection been thus presented, it would have admitted of a different consideration; but, on full examination, we are satisfied, that the result must have been the same. Taking the story of the witness as the criterion, it does not, on the face of it, shew him to have been interested in the result it tended to produce.

In this aspect it is supposed that the case of *Ripley v. Thompson* 12 Moore 55, is an authority for the exclusion of the testimony. One Gray had purchased horses of the plaintiff, for which he gave his own individual notes, saying nothing about the other defendants being interested in the purchase. Gray becoming insolvent, the plaintiff being apprised that Thompson was interested with Gray, sued the former in an action for goods sold and delivered, as if no notes had been given. Gray was not made a co-defendant, and was offered as a witness for the plaintiff, to prove the above facts, and was decided to be inadmissible. The case is widely different from

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the present. Here, I apprehend, as credit was solely given to Gray, the giving the notes would be regarded as payment, so that no action could be maintained against Thompson,—unless, indeed, there were fraud or collusion. At all events, Gray was solely liable on his notes for the whole debt, and he sought, by his testimony, to transfer a portion of that *onus* to the defendant.

Blacket v. Weir, 5 B. & C. 385, [11 E. C. L. 257,] is a case directly in point for the decision made below. There, Gilson, who was called as a witness, admitted, on the *voir dire*, that he was a partner with the defendant; and the four judges of the King's Bench agreed that he was a competent witness for the plaintiff. 2 C. & P. 305. A similar decision was made at *nisi prius* a few years before, *Bailey, J.*, presiding; *Cossham v. Goldney et al.*, 2 Stark. R. 413. See *Hudson v. Robinson*, 4 M. & S. 476; *Bauerman v. Radenius*, 7 T. R. 663. In *Lockhart v. Graham*, 1 Str. 35, in an action on a joint and several bond, a co-obligor, not sued, was held to be a competent witness, to prove the execution of the bond by the defendant.

The circumstance stated by the witness, that *he* actually borrowed the money, though, as he says, on the credit of the partnership, makes no distinction, in principle, between the present case and those cited. Taking the whole story of the witness together, as we should do, there is no *prima facie* sole liability,—as in *Ripley v. Thompson*; of course the witness stood precisely in the same predicament, as those in the above cases. It may, nevertheless, be true, in point of fact, that, in all these cases, except when written documents shew the reverse, the witnesses alone entered into the contracts and then falsely attempted to transfer a portion of the responsibility upon others. If so, it would furnish no sufficient reason to exclude them, inasmuch as the judgments, in the suits in which they testify, would not shield them, in subsequent suits, from responsibility for money paid, &c., for the whole amount, to those persons thus wrongfully compelled to discharge debts not contracted by them. The first judgments, being *inter alios*, could not be used to defeat, or limit, recoveries in the second suits. This is the view taken of the question in 1 Phil. Ev. 60. Both *Bailey, J.*, and *Holroyd, J.*, in *Blacket v. Weir*, viewed the subject in the same light. Starkie concurs in the same views; 2 Stark. Ev. 5; Ib. 783. These considerations are decisive of the precise question here.

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In one contingency, indeed, the testimony should go to the jury, under such instructions as would probably insure a verdict for the defendant, unless the plaintiff could bring other evidence to his aid. The jury might see reason to credit the witness in one part of his story, and not in another; they might therefore believe he borrowed the money, and informed the plaintiff that the defendant was a partner with him, and that the money was to be applied to partnership use,—but they might believe that these last circumstances were mere fabrications, without any foundation. Had any suggestions of that kind been made on trial, or had the counsel for the defendant specially called for instructions in reference to a contingency of that nature, it would have been error in the county court to have withheld such instructions. The case does not show, that any such suggestion, or request, was made.

The testimony of the witness Onion was therefore properly admitted to go to the jury, and there was no occasion for instructions to disregard it, from the attitude, in respect to the parties, in which it placed the witness, nor on account of the possible occurrence of the contingency alluded to.

The judgment of the county court is therefore affirmed.

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JOEL LULL v. CALEB F. MATTHEWS.

The purchaser of property at sheriff's sale, whether upon ~~mean~~ process, or execution, acquires no greater title to the property than the debtor possessed.

After condition broken the mortgagor becomes, at law, the absolute owner of the estate and is entitled to the immediate possession.

Where, after condition broken, and after the mortgagor had obtained a decree of foreclosure, but before the time for redemption had expired, the mortgagor cut wood upon the mortgaged premises, and the wood, while it remained upon the premises, was attached by a creditor of the mortgagor and sold at sheriff's sale to the defendant, and the wood remained upon the premises until after the time for redemption had expired, and the mortgagor took possession of the premises and forbid the defendant's removing the

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wood, and sold and used part of the wood himself, it was held, that the mortgagor, when he cut the wood, was a wrong doer and acquired no title to the wood, as against the mortgagee, and that the defendant acquired no title to the wood by his purchase and was not liable to pay the price which he had agreed to give for it.

INDEBITATUS ASSUMPSIT for wood sold and delivered, and for wood bargained and sold. Plea, the general issue, and trial by jury, May Term, 1844.—HEBARD, J., presiding.

On trial the plaintiff introduced testimony tending to prove, that one Brooks, as deputy sheriff, on the nineteenth day of April, 1842, by virtue of a writ of attachment in favor of Daniel P. Wheeler against James W. Evans, returnable to the then next term of Windsor county court, attached a quantity of wood then upon the farm on which Evans lived; that on the sixth day of May, 1842, Brooks, in pursuance of an agreement entered into by the parties, according to the statute, sold the wood to the defendant, at auction, at \$1.12 per cord, on a credit of six months; and that on the eighteenth day of May, 1842, and before the session of the court to which the writ was made returnable, Evans confessed judgment, in favor of the plaintiff in that suit, for \$469.68, and the writ was not entered in court, and no execution was taken out upon that judgment. It was conceded, that the plaintiff was then sheriff of the county of Windsor, and that Brooks was his deputy, and that the wood was attached and sold within his precinct.

The defendant then introduced testimony tending to prove, that the wood in question was cut upon the farm on which Evans then lived; that most of it had been drawn from the place where it was cut and piled up near the road, in a suitable and convenient manner for measuring; that about twelve cords had not been moved from the place, upon the land, where it was cut, and had not been piled up; that the land had been previously mortgaged by Evans to one Davis; that one of the instalments of the mortgage debt had become due, and Davis had brought his bill of foreclosure and obtained a decree, dated June 19, 1841, by which the sum then due was ordered to be paid on or before the third Tuesday in June, 1842; that payment was not made, according to the decree; that the wood in question was cut upon the land after the nineteenth of June, 1841, but before the time for redemption had expired; that

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after the time for redemption expired Davis had the possession of the farm; that in August, 1842, Davis forbid the defendant's taking away the wood, and sold a part of it himself; and that the wood remained upon the farm until the next winter.

It appeared, that, by the terms of the sale, Brooks was to have the wood measured; and testimony was introduced upon each side as to the time and manner in which this was in fact done,—which it is unnecessary to detail.

The court instructed the jury, *pro forma*, that, if the testimony was believed, the plaintiff was entitled to a verdict. The jury returned a verdict for the plaintiff. Exceptions by defendant.

C. Coolidge for defendant.

1. Evans, the execution debtor, had no property in the wood, and the creditor acquired no lien upon it. Being mortgagor, the debtor, after decree of foreclosure, was a mere tenant at sufferance. The wood was cut after the decree was made, and the severing it was an act of waste. When attached and when sold it was on the premises; therefore the officer had no power over it, and he could not sell and convey any interest in it. *Morey v. McGuire*, 4 Vt. 327. *Gore v. Jenness*, 19 Maine 53. *Blaney v. Bearce*, 2 Greenl. 137. *Smith v. Goodwin*, Ib. 173. *Stowell v. Pike*, Ib. 387. *Smith v. Moore*, 11 N. H. 55. *Sanders v. Reed*, 12 Ib. 558.

2. The present plaintiff has no title to this action. He could sue only on the ground of his official responsibility. The property having been sold on *credit*, and by his deputy, the plaintiff is under no liability over for the proceeds of sale; he has, therefore, no legal interest in the subject of the suit. *Fletcher v. Bradley*, 12 Vt. 22. *Strong v. Bradley*, 13 Ib. 9. *Kimball et al. v. Perry*, 15 Ib. 414.

Tracy & Converse for plaintiff.

1. The mortgagor is entitled to possession until the equity of redemption expires. Rev. St. 215, §§ 7, 8, 11. This wood, *when cut*, was, or was not, the mortgagee's absolutely. It was not a precarious interest, which might, or might not, thereafter ripen into a perfect title, depending on a future contingency. If it was the property of Davis when cut, it remained so, and could not be defeated, or divested, by the subsequent payment of the mortgage money. If it

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was not his when cut, it could not become so by any subsequent neglect of the mortgagor to pay the mortgage money. The mortgage created a lien on the *real estate only*. When the wood was severed from the freehold it became *personal property*, and the lien did not attach to it. The mortgagee could have no more claim to this wood, than to the crops of grass, grain, &c., that were taken from the land after decree and before foreclosure. Until foreclosure the claim of the mortgagee is a mere *chattel* interest in the mortgaged premises; the debt is the *principal* and the land the incident. *Peterson v. Clark*, 15 Johns. 205. *Hatch v. Dwight et al.*, 17 Mass. 289. Story's Eq. 286, §§. 1016, 1017; Ib, 284, n. 1. 4 Kent 157. *Clark v. Beach*, 6 Conn. 142. *Hooper v. Wilson*, 12 Vt. 695. *Martin ex d. Weston v. Mowlin*, 2 Burr. 978. *Runyan v. Mersereau*, 11 Johns. 534. 2 D. Ch. 100. 3 Vt. 202. 7 Vt. 100. 4 Vt. 108.

2. The fact, that the wood was not removed from the premises until after foreclosure, can make no difference with the question of title. It was sold at auction before foreclosure. If, when cut, it belonged to Evans, the fact of its remaining upon the premises after foreclosure could not make it the property of Davis. The case of *Morey v. McGuire*, 4 Vt. 327, is not like the present. The mortgagor had parted with all his interest in the mortgaged premises, before he cut the timber in question in that suit. It was as though Evans, in this case, had cut timber after the equity of redemption had been foreclosed and the mortgagee had taken possession.

3. The right to bring this suit in the name of the Sheriff cannot depend upon whether the property was sold on *credit*. Rev. St. 73, § 6.

The opinion of the court was delivered by

KELLOGG, J. It is very obvious, that whether the plaintiff was entitled to recover, upon the evidence detailed in the bill of exceptions, must depend upon the question whether the property in the wood, by virtue of the sale by Brooks, the plaintiff's deputy, passed to and vested in the defendant; for if it did, then manifestly the plaintiff was entitled to recover, and the charge of the county court was correct. The sale of the wood was not upon execution; but if it had been, or if the sale were entitled to all the effect of a sale upon exe-

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cution, while it would pass to the purchaser all the right and interest of the *debtor* in the execution, or process, under which the sale was made, yet it would not *conclude third persons*, who were not parties to the process. This point was settled in the case of *Griffith v. Fowler*, 18 Vt. 390.

It becomes important, then, to inquire whether Evans, the defendant in the process under which the sale was made, was in law the owner of the wood; for we take it to be clear, that the sheriff could not sell, and the purchaser could not acquire, any greater interest in the wood, than the execution debtor possessed. It is also well settled, that, after condition broken, the mortgagee becomes, at law, the absolute owner of the estate, and is entitled to the immediate possession; and that he can, from that time, charge the mortgagor, who becomes *quasi tenant* to the mortgagee, with the rents and profits. The only remedy of the mortgagor is in equity, by payment of the mortgage money.

In the case under consideration it appears, that the wood, which is the subject of the present controversy, was cut by the mortgagor upon the mortgaged premises, after the decree of foreclosure was made and near the expiration of the time limited for the redemption of the premises, and that the wood remained upon the premises after the decree of foreclosure became absolute, and after the mortgagee had taken possession of the premises; and that the mortgagee, after taking possession, took and sold a part of this wood. Now it was held by this court in *Morey v. McGaigre*, 4 Vt. 327, "that if the mortgagee, after condition broken, assign the mortgage and the mortgagor cut timber and leave it upon the premises until after the assignee takes possession, the mortgagor cannot maintain trover against the assignee for using the timber." In this case the court say, "that his, the mortgagor's, possession, when he cut the timber, was a mere tenancy at will. And whether his right of redemption was foreclosed, or not, would make no difference in this respect. The legal rights of the parties must be decided at law; and it would seem rather remarkable, if the law would admit the tenant at will to cut the trees of his landlord, and then recover of his landlord for using those trees."

The decision in the case above cited proceeds upon the ground, that the mortgagor was a wrong doer in cutting the timber and

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could acquire no title to it as against the mortgagee and his assignee. So, in the case at bar, Evans, the mortgagor, when he cut the wood, was a wrong doer, and acquired no title to it, as against the mortgagee.

The case farther shows, that after the mortgagee took possession of the premises, he forbid the defendants taking away the wood. This, under the circumstances, was quite sufficient to justify the defendant's subsequent refusal to take the wood. For we entertain no doubt, that, had the defendant attempted to remove the wood at any time after the purchase, upon application of the mortgagee the court of chancery, would, by injunction, have restrained the defendant from removing the same. Had the mortgagor redeemed the premises within the time limited by the decree, he would have acquired and perfected a valid title to the wood. But the premises were not redeemed.

Upon the whole, we are satisfied that Evans acquired no title to the wood, as against Davis, the mortgagee, and consequently, that the defendant acquired no title by the purchase at the sheriff's sale and therefore was not liable for the purchase money. The charge of the court was therefore wrong, and the judgment of the court below must be reversed.



JOSEPH A. GALLUP v. LEONARD B. SPENCER.

If a deponent have come to reside within thirty miles of the place of trial, subsequent to the giving of his deposition, and this is known to the party who took it, the deposition will not be allowed as evidence on the trial.

Where it was stated in the caption of a deposition, taken on the first day of May, 1844, that it was taken to be used at the term "next to be holden on the first Tuesday of May next," it was held, that one of the words "next" might be rejected as surplusage, and the deposition admitted as evidence. It is no objection to a deposition, that a term of the court intervenes between the time of taking and the term of court at which it is stated in the caption it is taken to be used.

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Covenant broken. Trial by jury, March T., 1843,—HEBARD, J., presiding. On trial the plaintiff offered the deposition of Norman W. Wallace, which had been taken with notice to the defendant, the deponent living, at the time of caption, more than thirty miles from the place of trial. The defendant objected to the deposition; and the court found the fact to be, that Wallace had come to reside and then resided within thirty miles of the place of trial, and that since giving the deposition he had testified in court on a trial of the case. The deposition was excluded. The plaintiff also offered the deposition of Lewis F. Gallup, to which the defendant objected, for the reason that it appeared, that the deposition was taken May 1, 1844, and it was stated in the caption that it was taken "to be used in a cause to be tried and heard before the county court, next to be holden at Woodstock, within and for the county of Windsor in the State of Vermont, on the first Tuesday of May next,"—the defendant claiming, that a term of the court intervened between the time of taking the deposition and the term at which it was taken to be used. This deposition, also, was excluded. Other questions, relating to the merits of the case, were reserved on the trial; but as no decision was given upon them by the supreme court, they need not be detailed here.

Verdict for plaintiff. Exceptions by defendant.

Washburn & Marsh for plaintiff.

Tracy & Converse for defendant.

The opinion of the court was delivered by

REDFIELD, J. In this case we think the deposition of Norman W. Wallace was correctly rejected. The cause of taking had ceased to exist, and this was known to the party taking the deposition, if we correctly understand the case. In such case we think the deposition cannot be used as evidence; *Patapsco Ins. Co. v. Southgate et al.*, 5 Pet. 615. If the deponent had not come to reside within the thirty miles, so as to remove the cause of taking the deposition, but was only temporarily within that distance, the deposition would still continue to be testimony, and might be used, unless the opposite party will be at the trouble to procure the attendance of the witness *in court*;—such, at least, has been the practice.

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In regard to the deposition of Lewis F. Gallup, we do not see how it can be treated as defectively taken. It is true, there is a repugnance in the caption, in stating the term of court at which it was taken to be used. Being taken upon the first day of May, it is said that it is taken to be used at the term "*next* to be holden, &c., on the first Tuesday of May *next*." One of these words "*next*" must be rejected; and rejecting either the deposition is well taken, as it seems to us. We know of no law requiring a deposition to be taken to be used at the *very next* term of the court. We think, however, the more correct construction of this caption is, to treat it as we do writs so expressed,—that is, reject the latter word "*next*" and let it stand as of the May Term next after the taking, which was no doubt the intention.

Judgment reversed and cause remanded.

SOLOMON DOWNER v. JOHN WOODBURY.

If, to a plea of justification under a rate bill and warrant, the plaintiff reply *de injuria &c.*, and no objection is taken to the replication, the defendant must prove every material allegation in his plea.

Where a collector of taxes justifies the taking of property under his rate bill and warrant, and alleges, in his plea, that he gave the bond, required by statute, for the faithful performance of his duty, but does not attempt to set forth the bond, or make profert of it, the fact that he acted as collector is sufficient proof of his having given a bond, to sustain his allegation.

If the collector justify under a warrant for the collection of a state tax, and allege the act of the legislature granting the tax, this allegation need not be specifically proved; for the court will take notice of the general law of the state.

An averment, in a collector's plea in justification, that the taxes in his rate bill "were assessed upon the lists of the persons named for the year 1840," and that the plaintiff and two others "were jointly and legally assessed the sum of \$2,07, being three cents on the dollar of the list of" said plaintiff and others "for the year 1840," is, upon a traverse, a sufficient allegation, that the plaintiff had a list in the town.

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But the collector, to sustain his plea, must prove that the plaintiff had a list in the town. The court will not infer this from the fact that the plaintiff's name is in the tax bill; and in this respect there is no difference between a state and town tax.

If the collector called upon the plaintiff for payment of the tax, and the plaintiff refused absolutely to pay it, it was not necessary that the collector should have given time for its payment, and appointed a time and place for receiving it; and evidence of such demand and refusal is sufficient, under a plea which alleges a regular notice of the tax, under the statute, and the appointment, by the collector, of a time and place for receiving payment, and a neglect to pay at that time; and in this case, the tax was against the plaintiff and others jointly, but the plaintiff, alone, was called upon and refused payment.

TRESPASS for taking a harness. The defendant pleaded in justification, and averred, among other things, that he was duly elected collector of taxes for the town of Bethel in March, 1840,—that he gave the bond, required by statute, for the faithful performance of his duties,—that an act of the legislature was passed in October, 1840, granting a tax of three cents on the dollar on the grand list of those liable to be taxed,—that the town of Bethel, at a legal meeting holden on the sixth day of April, 1840, assessed a tax of five cents on the dollar on the grand list of those liable to be taxed in the town,—that rate bills were, by the selectmen of the town, delivered to the defendant, and were duly assessed upon the lists of the persons named for the year 1840,—that the plaintiff and one Smith and one Bosworth were jointly and legally assessed in said tax bills, in the sum of \$2,07 for state tax and \$3,45 for town tax,—that the defendant, upon receiving the tax bills, gave notice to said Downer, Smith and Bosworth of the taxes against them, and requested them to pay the same, and appointed a time and place for receiving the same,—and that, the taxes being unpaid, the defendant distrained and sold the harness in question to pay the same. The plaintiff replied *de injuria &c.* Trial by the court, March T. 1845.—HEBARD, J., presiding.

On trial the defendant proved his appointment as collector of the town of Bethel, and gave in evidence his rate bill and warrant, and proved the taking and selling of the harness, as stated in his plea. On the rate bill were the names "Downer, Smith & Bosworth," with a statement of their list and of the taxes against them. The

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defendant also proved, that, before taking the harness, he called upon the plaintiff for the tax, and that the plaintiff absolutely refused to pay it. There was no evidence, that the plaintiff, either alone, or in connection with Smith and Bosworth, had a list in the town of Bethel, other than what appeared from the rate bill, nor that he had any property in Bethel; and it did appear, that he resided in the town of Sharon. There was no evidence, that the defendant gave a bond, as alleged in his plea; nor that he ever showed the tax to Smith, or Bosworth, or called upon either of them for payment, or that he ever called upon the plaintiff for payment, except as above stated, or that he ever notified either of them of a time and place for receiving payment. Other questions were raised and discussed by counsel; but as they were not passed upon by the supreme court, the facts, upon which they were predicated, need not be detailed here.

The county court rendered judgment for the defendant. Exceptions by plaintiff.

A. P. Hunton for plaintiff.

There was error in the judgment of the court below, because certain pertinent averments in the plea were unsupported by proof.

1. Whether the allegation, that the defendant gave a bond, was material, or not, it should have been proved. *Webb v. Horne et al.*, 1 B. & P. 281. 1 Chit. Pl. 261. *Bristow v. Wright et al.*, 2 Doug. 665. Gould's Pl. c. 3, § 183 *et seq.* *Fairhaven Turnp. Co. v. French*, 1 D. Ch. 209-212.
2. It is alleged, that the plaintiff was "legally assessed" and "liable and bound by law to pay" the taxes; and there is no proof to sustain the allegation. It does not appear, that the plaintiff had any list, or property, in Bethel. The tax bill professes to be made upon "the grand list of the inhabitants of the town of Bethel." The plaintiff was not an inhabitant of that town. The allegation is material. *Briggs v. Whipple*, 7 Vt. 15. The tax bill is not evidence, under this allegation; *Collamer v. Drury*, 16 Vt. 574.
3. No evidence was given, to support the allegation, that the defendant gave notice to Downer, Smith and Bosworth of a time and place for receiving payment of the tax.

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Tracy & Converse for defendant.

1. It is not alleged in the plea, that the plaintiff had either a list in Bethel, or property there; and if the plea was defective in those particulars, the plaintiff should have demurred.

2. The rate bill furnishes sufficient *prima facie* proof, that the plaintiff was legally taxed. *Wilcox v. Sherwin*, 1 D. Ch. 81. The "previous proceedings," which it was said, in *Collamer v. Drury*, 16 Vt. 574, the collector must show to have been correct, do not extend to this matter. If the collector must show, in the first instance, that the tax bill is, in point of fact, correctly made, and that the individuals therein named are correctly assessed, he is involved in difficulties, from which he could very seldom extricate himself. The vote of a tax is considered *prima facie* evidence that it is legal and for a legitimate object; *Briggs v. Whipple*, 7 Vt. 15; and it would not be consistent, to presume that the tax was not properly apportioned among those liable to pay it, or that it was made up against improper persons.

3. The fact, that the defendant had a legal rate bill and warrant, and acted as collector, is *prima facie* evidence that he had given the requisite bond. *Wilcox v. Sherwin*, 1 D. Ch. 81. *Potter v. Luther*, 3 Johns. 431. *Berryman v. Wise*, 4 T. R. 366. *Bush et al. v. Collins*, 7 Johns. 549. *Adams v. Jackson*, 2 Aik. 145.

4. Downer's refusing to pay the tax, when requested, was a waiver of any right in him to require farther notice, or time for payment, of the defendant. The want of such notice to Smith and Bowditch cannot affect the case, as their property was not distrained, and they are not parties to this suit.

The opinion of the court was delivered by

REDFIELD, J. In this case the replication being *de injuria &c.*, and no objection having been taken on that account, the defendant must prove every material allegation in his plea.

1. It is said, that there was no proof that the defendant had given a bond,—which is expressly alleged in the plea. But that allegation does not attempt to set forth the bond, or make any profert of it. We should therefore be inclined to think, that it was sufficiently shown that the collector gave bond, by his having acted as col-

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lector. The former fact will be inferred from the latter. It is, in fact, proof of it. It might be otherwise, if the bond had been described and vouched in proof.

2. The act granting the state tax is also expressly alleged; but it need not be specifically proved, because the court will take notice of a general law of the state. This point is, in principle, precisely analogous to the last.

3. It is claimed by the defendant, that the plea contains no averment, that the plaintiff had any list in the town of Bethel. But it is alleged, that both of the taxes in the rate bill "were assessed upon the lists of the persons named for the year 1840," and also, that the plaintiff and two others "were jointly and legally assessed the sum of \$2,07, being three cents on the dollar of the list of said Downer and others for the year 1840." This averment was sufficient upon a traverse, and probably upon a general demurrer.

But it is said, this, also, is one of those facts, which the court will infer from the tax bill, especially in the case of state taxes. But we think not. The case of a state tax does not differ, in this respect, from that of a town tax. In the case of a state tax the court will take notice of the voting of the tax; and the issuing of the treasurer's warrant proves nothing, and raises no intendment, as to the persons liable to pay taxes. That is a matter to be determined by the selectmen, the same as in the case of town taxes; and, if it will be presumed in one case, it should be in the other. It is a fact necessary to be shown, to establish the right of the selectmen to make an assessment upon the plaintiff,—the very foundation of their jurisdiction. In regard to this the case of *Collamer v. Drury*, 16 Vt. 574, is strictly in point.

4. We do not perceive why the notice to Downer was not sufficient, so long as he expressly disclaimed all intention ever to pay the tax, unless compelled. Under these circumstances the law will hardly require of a collector to give time and appoint a place, where he will receive the tax.

Judgment reversed and cause remanded.

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ADMINISTRATOR OF JAMES BARNARD v. THOMAS RUSSELL.

If the levy of an execution upon land is valid as against the debtor, it is valid as against subsequent attaching creditors.

Where, in the description of land levied upon, the starting point was stated to be in the north line of a certain highway and at the north-west corner of a certain house lot, and it appeared, that the house lot lay on the north side of the same highway and that its south-west corner was the only point where it adjoined the road and the land levied upon, it was held, that the court would intend that the word "north-west" was written, by mere clerical error, for "southwest," and that the mistake was not fatal to the levy.

Where, in such description, the course and distance of a line are given and also a known monument as its terminus, the monument must govern; and it makes no difference, in this respect, whether the error in the course given is a variation of one degree, or of ninety degrees.

EJECTMENT for land in Woodstock, described as follows;—"Beginning in the north line of the road from the brick meeting house to the jail in Woodstock, at the south-west corner of the house lot where Grover Dodge formerly lived, but where Asa Tinkham now lives; thence running north seventeen degrees west six rods; thence south fifty-nine degrees east two rods and seventeen links to the south-west corner of the place on which a large barn formerly stood; thence north twenty degrees west, by the west side of said barn, to Amos Warren's garden; thence north eighty-eight degrees west, by said Warren's garden, to the center of the Oil Mill brook, thence up said brook, and on the easterly line of land Sylvester Edson formerly conveyed to Grover Dodge, to a point in the north line of said road six feet westerly from the south-west corner of the plastered house now in a state of repair by Messrs. Russell & Clark; thence easterly, on the said line of said road, to the place of beginning." Plea, the general issue, and trial by jury, November T. 1844.—HEBARD, J., presiding.

On trial, the plaintiff showed title in himself to the premises in question by virtue of a regular levy of an execution in his favor against one Sylvester Edson, the former owner of the premises, by the same description contained in his declaration, and proved the

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defendant to be in possession. The defendant then offered in evidence the record of the levy of an execution upon the same premises in favor of one Asaph Fletcher against Sylvester Edson, and claimed title under the same. That levy was prior to the one proved by the plaintiff, and the premises were described as follows;—“Beginning in ‘the north line of the road leading from the brick meeting house to ‘the court house, at the *north-west* corner of the house lot now oc-‘cupied by Grover Dodge, being the house lot of which one undivi-‘ded half was set off to Simeon Willard on an execution against Syl-‘vester Edson; thence north seventeen degrees west six rods; thence ‘south fifty nine degrees east two rods and seventeen links to the ‘south-west corner of a large barn; thence north twenty degrees ‘west, along the west side of said barn, to Amos Warren’s garden; ‘thence north eighty eight degrees west, on said Warren’s garden, ‘to the centre of the Oil Mill brook; thence *down* the centre of said ‘brook to the land said Edson sold Grover Dodge; thence southerly, ‘on said Dodge’s east line, to the road; thence eastwardly, on said ‘road, to the place of beginning;” and it was conceded, that there was no other land in Woodstock, which bore the description contained in this levy. The plaintiff objected to the levy, so offered in evidence, for the alleged reason that it did not describe any land by metes and bounds; but the objection was overruled.

Verdict for defendant. Exceptions by plaintiff.

T. Hutchinson for defendant.

The regularity of the plaintiff’s levy is not disputed; but the plaintiff insists, that the levy under which the defendant claims is void for want of sufficiently definite boundaries. The statute is express, that the land must be described by metes and bounds,—meaning such as really exist and can be ascertained with certainty, and not rest upon uncertain conjecture. *Clark v. Clark*, 7 Vt. 190. *Bott v. Burnell*, 11 Mass. 163. *Lessee of McCoy v. Galloway*, Ohio Cond. R. 576. *Kerr et al. v. Marsh*, Ib. 80. The cases, in which levies, which appear defective, have been established, are where, by aid of the actual, fixed and visible boundaries, the defect can be supplied with perfect certainty. *Galusha v. Sinclair*, 3 Vt. 390. *Johnson v. Pannel’s Heirs*, U. S. Cond. R. 84. *McGregor v. Brown*, 5 Pick. 174, 175. *Kinley v. Williams et al.*, 3 U. S.

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Cond. R. 331-333. But in this case the *north-west* corner of a certain house lot is as much an actual, fixed and visible monument as the *south-west* corner would be, or as a large rock would be; and *down* the centre of the Oil Mill brook is as much an actual, fixed and visible boundary, as a stone wall would be.

J. Barrett for defendant.

1. The land is sufficiently described by metes and bounds, in the levy of Fletcher's execution. Rev. St. c. 42, § 20. *Maeck v. Sinclair*, 10 Vt. 103. *Boylston v. Carver*, 11 Mass. 517. *Gibson v. Thompson*, 11 Vt. 644.

2. A mistake in the description would not necessarily render the levy void. If there is sufficient contained in it to identify and set forth the subject truly, the erroneous part is to be disregarded, or to be construed into conformity with what is true, and thus effect be given to what was intended. In this case the starting point is called the *north-west* corner of the house lot; it should have been the *south-west*, as is obvious from the fact that the point is in the north line of the road. By taking any of the after mentioned points and running back by the bounds, courses and distances, the mistake is at once cleared up. Reject the word "north" before the word "west," and the description is perfect. *Galuska v. Sinclair*, 3 Vt. 394. *Gilman v. Thompson*, 11 Vt. 643. *Vose v. Hardy*, 2 Greenl. 322. *Wing v. Burgess*, 1 Shep. 111. *Hall v. Fuller*, 7 Vt. 100. *Gates v. Lewis*, Ib. 511. *Perman v. Weed*, 6 Mass. 131. *Massie v. Watts*, 6 Cranch 148. *Shipp v. Miller's Heirs*, 2 Wheat. 316, [4 U. S. Cond. R. 132.]

The opinion of the court was delivered by

REDFIELD, J. The only question in this case is in regard to the description of the land. The statute, in such cases, requires the land to be described by "metes and bounds." It is so described here, if described at all.

We are not aware, that the question in this case is to be viewed any differently, because the land has been subsequently levied upon by other creditors. The question is not, which of these levies is the more perfect, but, is that of the defendant such as will enable him to hold the land? And we do not see why, if the levy is good

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as against the debtor, it is not good against every body. In this view we do not see why any different rule is to be applied to a levy from that which is applicable to a deed, except, that when a deed will bear one of two constructions *equally well*, it shall have that construction which is most unfavorable to the grantor;—but it seldom happens, that a case is decided mainly upon that ground.

But in all cases, whether of a deed, or levy, when it depends upon mere conjecture what land is intended to be conveyed, the deed, or levy, shall be held void. But we seldom find such cases in the books; and those we do find are far less difficult, sometimes, than others, which have been sustained; so that one decision upon this point is not much guide to another. But in the present case we think the levy may stand good. The *general object*, to point out the neighborhood in which the land is situated, is well ascertained. The land must lie north of the road; and the starting point is on this road. The expression is, “in the *north* line of the road.” But here comes the first uncertainty; it says farther, that this point is the “*north-west corner* of the house lot now occupied by Grover Dodge.” That house lot adjoins this road on the north; but it is the *south-west corner* which adjoins the road, instead of the north-west. This is the only point, at which the *west* side of the house lot meets the road. This is the nearest we can reconcile the language. There is a manifest, palpable discrepancy. We must, then, reject something. This is the *least*, which will reconcile the terms; and this is in accordance with the rule to give effect to *all* of the deed *we can*.

The parties could not be mistaken as to the road, or that the *west* side of the house lot was intended; for that is the only side of the house lot which touches the road and at the same time the land levied upon. It is therefore perfectly certain, that *north* was written for *south*, and as we proceed in this way, we find all the other monuments to coincide with the levy,—the barn, the garden of Warren, and so along the garden to the centre of the brook. But here, again, the *course* is quite wrong; but the next *monument* is well known,—the land that Edson sold to Grover Dodge. In all such cases courses and distances must be rejected and known monuments followed. And here, that the *opposite* course is given is of no importance; it is no more difficult to follow it, than if it only varied *one degree*.

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The next point is, where the centre of the brook intersects that land. If the course is to be rejected, it matters not how much or how little it varies. This makes the levy good.

In the case of *Maeck v. Sinclair*, 10 Vt. 103, the levy was made good, as to the description of the land, by reference to deeds on record; in *Gilman v. Thompson*, 11 Vt. 643, the same result was attained by reference to land before conveyed,—which is the same in principle; and in *Galusha v. Sinclair*, 3 Vt. 394, it was done by running lines by the known monuments,—which is all that is done here. If we apply the illustration used by the judge, in that case, to this, of running the lines back from other known monuments,—and which, I think, is sound,—being the very mode which a surveyor always adopts in cases of doubt,—it removes all difficulty in the present case.

Judgment affirmed.

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**SOLOMON DOWNER AND RANDOLPH WASHBURN v. HORACE DANA
AND ELIHU NORTON.**

It is an established rule of practice in this state, that testimony as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, cannot be received, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations;—and in this respect this court have fully sanctioned the English rule, which proceeds so far, as to admit of no exception, even in cases where, when the cross examination was closed, the party wishing to impeach had no knowledge of the variant declarations or inconsistent conduct of the witness, and the witness has departed from court and cannot be recalled.

But this rule has no proper application to testimony in the form of depositions, whether taken with or without notice, and whether the adverse party attended at the taking, or not; but the party may, in such case, without previous inquiry, prove any inconsistent declarations or conduct of the witness.

Where the deposition of a witness is used by one party upon the trial, a deposition of the same witness, taken by the other party, but which is inadmissible, as such, by reason of a defect in the caption, may yet be received, as a declaration of the witness, for the purpose of impeaching the testimony contained in the former deposition. *Semb.*

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Under the plea of *non est factum*, in an action of debt upon a jail bond, the defendants may avail themselves of any ground of defence, showing that there never was any legal validity to the bond.

If the jail limits, in a county, are capable of being ascertained by a resort to the records of the county court, as is ordinarily the case, then such resort must be had; if not, proof of general understanding and acquiescence of all concerned, for thirty years, and probably for fifteen years, in certain recognized and well defined boundaries is equivalent to record proof.

In this case the county court charged the jury, that if certain territory had been, for thirty years, regarded by the community, and adopted and acquiesced in by all who had any interest in learning the extent of the jail limits, as being a part of the jail limits, and the fact of its being part of the jail limits had never, during that time, been questioned or disputed, although it did not appear to have been established by the court, in pursuance of the statute, it would now be regarded as within the jail limits, and a prisoner's going upon that territory would not be a breach of his jail bond; and it was held, that there was no error in the charge.

Where it appeared, that the jail limits were regularly laid out and established by the county court, and some rods exterior to one of the lines a tree stood, marked plainly with the letters G. L., indicating that it was on the line of the gaol limits, but it did not appear by whom or when the tree was thus marked, although it was less than thirty years, but more than fifteen years, before the alleged escape, and it appeared, that, from the time it was so marked, the prisoners upon the limits had been accustomed to go to that tree, and treat it as one corner of the gaol limits, the going to this tree, by a prisoner on the limits, was held, by a majority of the court, not to be a breach of his jail bond. *Prince v. Burnham et al.*, Chittenden Co., 1832, cited by DAVIS, J.

DEBT upon a jail bond. Plea, *non est factum*, with notice of special matter of defence, and trial by jury, March Term, 1845,—HEBARD, J., presiding.

On trial it appeared that the defendant Dana had heretofore been committed to the common jail in Orange county upon execution in favor of the plaintiffs, and that the bond in suit was executed, in common form, upon his being admitted to the liberties of the prison; and the plaintiffs gave in evidence a transcript from the records of Orange county court, by which it appeared, that that court, at their December Term, 1813, appointed a committee "to survey and lay out the gaol yard in said county, in such manner as that it shall contain four square miles," in such form as the committee might

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think proper; that the committee, on the twenty first day of December, 1813, and during the same term of the court, made a report, accompanied by a plan, laying out the jail limits in a square form; that on the twenty second day of the same December, and before the report was accepted, an alteration of the jail limits was proposed and surveyed, and was marked upon the plan, but not incorporated into the report of the committee, by which a small piece of land was added to the jail limits, near the south west corner of the limits as first surveyed, and an equal quantity was taken from the first survey, at the south west corner;—and the record showed an acceptance of the report by the court, during the same term, in these words,—“*Report accepted by the court as first laid out until June Term next.*” It was conceded, that no other record, or written proceedings, as to said limits, exist, or can be shown to have existed.

The plaintiffs also gave in evidence the deposition of one Smith, taken *ex parte*, and the deposition of one Rutter, taken with notice to the defendants, but at the taking of which the defendants did not attend,—which depositions tended to prove a breach of the condition of the bond declared upon. The plaintiffs also introduced other evidence, tending to prove that Dana, after his commitment, and after the execution of the bond in suit, had been to a house in Chelsea, called the Douglass house, which was without the limits of the first survey made by the committee, as above mentioned.

The defendants then offered parol evidence, tending to prove that the additional piece of land, included in the survey of the proposed alteration of the jail limits as first surveyed, had, for about thirty years, been taken by the people of the vicinity to be a part of the jail yard, and that the prisoners admitted to the liberties of the jail had, during that time, been accustomed to go there, and that the Douglass house was upon that additional piece. To this evidence the plaintiffs objected,—but it was admitted by the court.

The defendants also offered in evidence a deposition of said Smith, which was objected to by the plaintiffs for insufficiency of the caption and was excluded by the court; but its signature by Smith and the administration of the oath to him by the justice being proved, it was again offered in evidence for the purpose of impeaching Smith. To this, also, the plaintiffs objected; but the objection was

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overruled by the court. The defendants also, for the purpose of impeaching the witness Rutter, offered to prove declarations made by him previous to the giving of the deposition used in the case by the plaintiffs, but in reference to which no preliminary inquiry had been made of him. To this the plaintiffs objected; but the evidence was admitted by the court.

The plaintiffs requested the court to charge the jury, that the proceedings of the county court of Orange county fixed the limits of the jail yard as first surveyed, and that, if Dana went without those limits, they should return a verdict for the plaintiffs.

But the court charged the jury, that, if the additional piece of land, designated upon the plan, has been for thirty years regarded by the community, and adopted and acquiesced in during all that time, by all who had any interest in learning the extent of the jail limits, as being part of the jail limits, and the fact of its being a part of the jail limits has never, during that time, been questioned or disputed, although it does not appear to have been established by the court, it will now be regarded as within the jail limits, and that Dana's going upon that additional piece would not be a breach of his jail bond.

Verdict for defendants. Exceptions by plaintiffs.

Hunton and Tracy & Converse for plaintiff's.

I. The court below erred in admitting the parol evidence offered by the defendants.

1. The liberties of the jail could only be set out in pursuance of the statute; Slade's St. 219, § 9; Ib. 234, No. 16; See Vermont State Papers 458-9. The offer was, to prove that from about 1813 the piece of land, which was surveyed as an alteration of the jail yard, had been regarded as a part of the jail yard; and the case then shows conclusively how it came to be so; and no presumption of law exists, or of fact could be made, to the contrary. *Jackson v. Wilkinson*, 3 B. & C. 413, [10 E. C. L. 185.] *Campbell v. Wilkinson*, 3 East 294, 301. *Smith v. Higbee*, 12 Vt. 113. *Hathaway v. Clark*, 5 Pick. 490. *Brunswick v. McKean*, 4 Greenl. 508. If it had appeared from the plaintiff's testimony, in the first instance, that the defendants were his tenants, as in the case of *Mitchell v. Walker*, 2 Aik. 286, or if the defendants had offered to prove this,

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they would not have been permitted to give in evidence their possession and use; it would have been entirely irrelevant; but no more so than the evidence offered in the case at bar. A presumption cannot stand, if the contrary appear. *Goodtitle ex d. Bridges et al. v. Duke of Chandos*, 2 Burr. 1073. In the case at bar the contrary did clearly appear.

2. The plaintiffs never before had an interest, a right, or an opportunity, to object to the persons, who were admitted to the liberties of the jail, going to the land included in the second survey; therefore no presumption ought to be made against them. 2 Burr. 1073. *Daniel v. North*, 11 East 372.

3. The evidence was not admissible as tending to show a prescriptive right. 1. It had no tendency to show that the defendants, and those under whom they claimed, had immemorially used to enjoy the privilege. 2 Bl. Com. 263. 3 T. R. 147. 5 Ib. 411. 2.

• A prescription must always be laid in him that is tenant of the fee. 2 Bl. Com. 264. 3. A prescription cannot be for a thing which cannot be raised by grant; 2 Bl. Com. 265; it is founded upon a grant; *Morewood v. Wood et al.*, 4 T. R. 161; which, where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of it, will be presumed; *Clarkson v. Woodhouse*, 5 T. R. 414, in note. 4. What is to arise by matter of record cannot be prescribed for. 2 Bl. Com. 265. *Mayor of Hull v. Horner*, Cowp. 102.

4. Nor was the evidence admissible, as tending to show dedication, as in case of highways. In that case the public, by use, gain a right against individuals, the owners of the land; in this case the owners of the land have no right or interest in the matter, as owners, and the plaintiffs could not have granted the right. *Barker v. Richardson et al.*, 4 B. & Ald. 579, [6 E. C. L. 623.] *Wood v. Veal*, 5 B. & Ald. 454, [7 E. C. L. 158.] *Rugby Charity v. Merryweather*, 11 East 375, in note.

5. Nor as showing a bar. *Campbell v. Wilson*, 3 East 301. *Oswald v. Leigh*, 1 T. R. 272. *Mayor of Hull v. Horner*, Cowp. 102. Lapse of time is an absolute bar, when made so by statute,—Cowp. 108,—and pleaded.

II. The court erred in not charging as requested. The legal effect of the record testimony was as the court were requested to

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state it to the jury. All ground of presumption in favor of the defendants was taken away by the evidence. *Griffith v. Matthews*, 5 T. R. 296.

III. The court erred in their charge. The only ground for any pretence of claim, that the Douglass house was within the jail limits, is that the proper authority made it so. But the court instructed the jury, that they might find for the defendants; though that fact did not appear. That is a fact which the court cannot presume. *Goodtitle ex d. Jones v. Jones*, 7 T. R. 43. It belongs exclusively to the jury. *Gayetty v. Bethune*, 14 Mass. 49, 55. 2 Aik. 270. *Livett v. Wilson*, 3 Bing. 115, [11 E. C. L. 57] 12 Vt. 124. *Gray v. Gardner*, 3 Mass. 402. *Cobman et al. v. Anderson*, 10 Mass. 105. *Roe ex d. Johnson et al. v. Ireland*, 11 East 280. *Dawson v. Duke of Norfolk*, 1 Price 246. *Eldridge v. Knott et al.*, Cowp. 214. *Wright v. Smythies*, 10 East 409. *Read v. Brookman*, 3 T. R. 159. *Powell v. Milbanke*, Cowp. 103, in note. *Sherwin v. Bugbee*, 16 Vt. 439. *Dillingham v. Snow et al.*, 5 Mass. 547. *Univ. of Vt. v. Reynolds*, 3 Vt. 542, 558, 559. Mere possession, or use, gives no title whatever. *Goodtitle ex d. Parker v. Baldwin*, 11 East 488. 11 East 371. *Stocks v. Booth*, 1 T. R. 428. *Rogers v. Brooks et ux.*, Ib. 431, n. But this is not a proper case, in which to presume that the county court acted, unless the jury should be reasonably satisfied that such action has been had. *Doe ex d. Fenwick et al. v. Reed*, 5 B. & Ald. 232, [7 E. C. L. 79.] It is, in principle, like the case of *Daniel v. North*, 11 East 372.

IV. The court erred in admitting the evidence as to the witness Rutter. The deposition was taken with notice, and the defendants had an opportunity to inquire of the witness as to the conversation concerning which the evidence was given, but did not do so. *Queen's Case*, 2 B. & B. 300, [6 E. C. L. 122.] *Angus v. Smith*, 1 M. & M. 473, [22 E. C. L. 360.] 1 Stark. Ev. 145, 146.

O. P. Chandler and L. B. Vilas for defendants.

1. Parol evidence was properly admitted by the county court to show the limits of the jail yard by reputation and acquiescence. There is no record evidence of the existence of the jail yard since June Term, 1814, and the only way in which the limits could be shown was by parol. This court have held, that the organization

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and limits of a school district may be proved by reputation. *Barnes v. Barnes*, 6 Vt. 388. *Sherwin v. Bugbee*, 16 Vt. 439. In the case of *Prince v. Burnham et al.*, decided in Chittenden county in 1831, (not reported,) we understand the very question now raised was distinctly presented and decided in conformity to the decision of the county court in the case at bar. In some of the neighboring states evidence of a similar character and for a similar purpose has been received and acted upon. *Clap v. Cofran*, 7 Mass. 98. *S. C.*, 10 Mass. 373. *Freeman v. Davis*, 7 Mass. 200. *Ballow v. Kipp*, 7 Johns. 175.

2. The testimony admitted to impeach the Deposition of Rutter was properly received. We recognize the rule contended for by the plaintiffs, when applied to witnesses in court; but in reference to depositions it is inapplicable. There can be no distinction between *ex parte* depositions and those taken with notice.

The opinion of the court was delivered by
DAVIS, J. The first question which arises is, whether the decision of the county court was right in admitting the defendant to shew the previous declarations of Rutter, with a view to impeach his deposition introduced by the plaintiff,—it appearing, that, at the time of taking the same, no person appeared on behalf of the defendants, although they had due notice, and that consequently the deponent was not interrogated in respect to such declarations.

It is indeed an established rule of practice in this state, that testimony of this kind cannot be received to impeach a witness produced upon the stand, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations. This rule is carried so far in England, as to admit of no exception, in cases where, when the cross examination was closed, the party wishing to impeach had no knowledge of the variant declarations, or inconsistent conduct, and the witness has departed from court and cannot be recalled. *Queen's Case*, in House of Lords, 2 Brod. & Bing. 212. This court have fully sanctioned the rule as existing in England. In Massachusetts it has never been adopted. *Tucker v. Welsh*, 17 Mass. 160. I infer, also, that it has never been adopted in New-Hampshire; *French v. Merrill*, 6 N. H. 465; nor in Connecticut; *Judson v. Blanchard*, 5 Conn. 557.

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As observed by Ch. J. PARKER, in *Tucker v. Welsh*, the rule seems to be of recent origin in England, as no mention is made of it by either Peake, or Phillips, in their treatises upon the law of evidence. Starkie recognizes it in his text as settled law. He is, I think, the first English writer that does so. 3 Stark. Ev. 1753-4. Ch. J. PARKER says, it has never been adopted in this country. This remark was made as long ago as 1821. At that time I think no lawyer in Vermont had heard of such a rule here; and even now I do not find it naturalised any where, except here. It is not adopted in Maine. *Ware v. Ware*, 8 Greenl. 42. Prof. Greenleaf, in his valuable treatise on evidence, [1 Greenl. Ev. 514,] adopts the English law in his text, without scruple, and in a note adds, that in this country the same course is understood generally to have been adopted, except in Maine, and *perhaps* Massachusetts. I do not understand on what grounds the doubt in respect to the latter State is suggested. In the case of *Tucker v. Welsh* it is distinctly and emphatically repudiated; the Chief Justice giving his reasons for doing so at some length. The case cited by the learned professor, as giving rise to the doubt,—*Brown v. Bellows*, 4 Pick. 188,—it seems to me, is not at all in conflict with the doctrine of *Tucker v. Welsh*. The point involved and decided simply respected the extent, to which a party may go in contradicting his own witness. One Lord was called by the plaintiff, from necessity, to prove the execution of a paper, to which he was a subscribing witness. On his cross examination he stated a fact adverse to the plaintiff's interest, in relation to his connection with the defendant. The plaintiff was allowed to prove by Ormsby, that Lord had made statements at variance with his testimony on cross examination. It is true, however, that, on trial, Lord was first interrogated as to those statements. The point in question, therefore, did not come at all before the supreme court. No cases are cited from any of the American States, to sustain the sweeping remark alluded to in the note.

Were the question *res integra*, I confess I could see no advantages to the cause of truth and justice, from the adoption of this rule of evidence, which are not equally well secured by the old practice of allowing the party, whose witness has in that way been attacked, to recall him, if he chose, for the purpose of contradicting or explaining the conduct or declarations imputed to him. Indeed I have seen no

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objections of consequence to that course, except that it may sometimes happen, that the witness may have departed from court, supposing his attendance no longer necessary. Such an objection, practically, is entitled to very little weight, as it would be provided against by requiring, as is in fact generally done for other reasons, witnesses to remain in court until the testimony is finished. On the other hand, this rule would be productive of intolerable mischiefs, were it not mitigated by the somewhat awkward and inconvenient expedient of suspending the regular course of the testimony, for the purpose of recalling the witness proposed to be impeached, and laying a foundation for the impeaching testimony by interrogating him, whether he did or said the things proposed to be proved. Besides, the privilege of doing this will be lost in all those cases, where the witness has left court and cannot be found. The opposite party has every inducement to cut off this opportunity by immediately discharging all such, as he may have reason to suspect are liable to be impugned. In addition to this, the avowed attempt to produce self impeachment, made, of course, in a tone and manner evincing distrust of the general narrative, too often both surprises and disconcerts a modest witness. He answers hastily and confusedly, as is natural from having such a collateral matter suddenly spring upon him. Every one, conversant with judicial proceedings, must have often observed with pain an apparent contradiction, produced in this way, when he is satisfied none would have existed under a different mode of proceeding.

Although to my mind these considerations present very formidable objections to the practice first authoritatively developed on the trial of the Queen in the House of Lords, yet I acquiesce in it as the settled practice in this state.

It remains to be considered, whether it can be properly applied in the case of depositions.

In the case of *Tucker v. Welsh*, already cited from Massachusetts, the court were urged to adopt the practice in respect to testimony taken in that form, though they should not be disposed to do so in other cases. The court, however, could perceive no special reasons in favor of such a discrimination. We think there are substantial reasons why a discrimination should be made the other way. The rule thus applied would impose on a party, wishing the privil-

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ege of impeachment, the necessity of attending in person, or by counsel, at the taking of every deposition to be used against him, within or without the state, which, on any other account, he might not be disposed to do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to, until actually given; the notice of the taking may be barely sufficient to enable him to reach the place, perhaps hundreds of miles distant, in season to be present. It would be idle, under such circumstances, to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony, precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony, and cannot be called upon to contradict or explain it. This may be an evil, but is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions, unless under regulations, which would reduce the right to a nullity.

We attach no importance to the circumstance, that the defendants, though notified, were not present at the taking of Rutter's deposition. Had they been present, the result would have been the same. In our opinion the rule adverted to has no proper application to testimony taken in the form of depositions. The impeaching testimony was therefore properly admitted.

The exception taken to the admission of the deposition of Smith, on the part of the defendants, is now abandoned.

A more important question, the principal one on which the case depends, remains to be considered; and that is, whether the county court were right in permitting evidence to go to the jury, the object and tendency of which was to shew a *de facto* establishment of jail limits in Chelsea, and in their instructions in reference to such testimony.

By an act of the legislature, passed in 1797, it was made the duty of the several county courts to set out jail yards in the respective counties, which, by a subsequent statute, passed in November 1813, are required to be limited to four square miles in extent. At their next term after the passage of this last statute, the county court of Orange county, in December, 1813, appointed a committee of four

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persons to lay out and survey a jail yard for that county, in such form as they should think proper, but so as to contain four square miles,—who were required to report during the then present term of the court. This committee drew up in writing, and presented to the court, their report on the 21st of December, 1813, setting out the yard by metes and bounds in a square form, containing four square miles, accompanied by a map and plan of the same, constructed by John McDuffie, the surveyor employed by them. On the 22d of the same December the said surveyor presented the field minutes of an altered survey, entitled "Plan of jail yard alteration," which varies from the original survey by adding on, near the south west corner, a parallelogram-shaped piece, comprehending 6370 square rods, or nearly one sixteenth part of a square mile, and by cutting off from the original plan, a little farther west, at the corner, an equal quantity of land. What motive suggested the proposed alteration does not appear; probably some considerations of convenience, arising from the nature of the localities in that vicinity. This proposed alteration seems never to have been acted upon, or in any way noticed, by the committee; but was before the court, when the following order was made and entered upon the records. "Report accepted by the court *as first laid out* until June Term next." No farther action of the court at that or at any subsequent term appears to have been had; and the exceptions say, that it was conceded, that no other record or written proceedings exist, or can be shown to have existed.

There was evidence in the case showing that Dana, the principal in the bond, after commitment, and before any discharge, went to a house called the Douglass house, situated without the original survey, but within the limits of the additional piece above referred to. This, with the other testimony in the case, tending to shew that the disputed territory had been recognized by the people of the vicinity, for about thirty years, as a part of the jail yard, that during that long period prisoners on the limits had been accustomed to go to that house, raises the question, whether any legal jail limits existed, which were transgressed by going thither. The propriety of its admission is of course involved in the legal results deducible from it.

It is manifest, from the instructions requested on the part of the plaintiffs' counsel, that they suppose the limits originally indicated

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by the committee and accepted by the court constitute the true and only jail limits established by law. If they are right in this, the testimony in regard to general acquiescence should not have been received, and the charge founded thereon was wrong. But it seems to me, upon the principles assumed by them, it is exceedingly difficult to come to the conclusion, that any jail limits whatever were established, which continued after June, 1814;—if so, neither the bond nor the assignment thereof could have any legal validity, and consequently this suit could not be sustained. Taking the record, alone, as our guide, and disregarding, as I think we should do, an objection interposed here by the defendants, that accepting the report alone cannot be considered as establishing the demarcation therein recommended, we find simply jail limits established provisionally until June term, 1814; after which they cease to exist as such.

Should it be urged, that it was not, by law, competent for the court to lay out and establish a yard for a limited period, the difficulty is not obviated; because, having no power to do what they attempted to do, their whole proceedings were a nullity. The only alternative, which offers an escape from this conclusion, is to be found in construing language, importing unequivocally a limited period, to mean perpetually. This we are not prepared to do.

The plaintiffs, then, in denying that any legal jail limits can be otherwise established than in the mode indicated by statute, have foreclosed all right to a recovery; for it cannot be doubted, that, under the plea of *non est factum*, the defendants may avail themselves of any ground of defence, showing that there never was any legal validity to the bond. They are thus forced to the necessity of falling back upon principles, which constitute the basis of the defence. The record equally fails both parties; and although the mode of considering the subject by them is different, and would lead to a different circumscription of the yard, it is not the less true, that both are under the necessity of abandoning the language of the record and resorting to reputation or usage. Perhaps the case might be properly left here, affirming the judgment upon the grounds above indicated.

As, however, the views taken by the court below, though not new in themselves, may be regarded as having a novel application, I pre-

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ceed to announce the conclusion to which the court has come in reference to them.

This subject opens a wide field, and the cases having a bearing upon it are exceedingly numerous. From an examination of many of them we cannot fail to see, that the principle of dispensing with strict and exact proof, in the prescribed form, of every estate, interest, authority, easement, &c., is one of universal application in every branch of the law, municipal, or national. Any system of jurisprudence, which should discard it, would be intolerable. It is diversified and modified in a thousand ways, but can be traced everywhere. Under the name of prescription, limitations, presumption, estoppel, reputation, acquiescence, it is, in essence, the same thing. The only difficulty exists in making a proper application of it. No doubt it would be going too far, to say, that any power of discrimination, or amount of industry, could deduce from the chaos of decisions a clear, rational and intelligible system, accommodated to the varied position of parties, the nature of the estate, right, or authority, to be affected. Neither a Bacon nor a Coke nor a Mansfield could accomplish so herculean a task.

By the law of England, which also prevails in most of the states, a right to an easement, as a way, a water privilege, use of light, &c., may be acquired by an uninterrupted enjoyment for twenty years. The old authorities, indeed, treated the question as one of presumption merely, to be determined as a question of fact by the jury. They admitted proof, of course, that the fact was not in accordance with the presumption. Practically, and by degrees, it assumed the force, if not the form, of a legal conclusion; and, as remarked by Ch. Kent,—3 Kent 445,—the latest English authorities make this presumption one *juris et de jure*, having all the stability and force of a formal grant. It has long been so considered in this state. This is a practical common sense view of the subject, which can alone secure the full advantages of the principle. In this state in analogy to our limitation act in respect to real estate, the time is reduced to fifteen years,—especially in reference to all rights, interests, or privileges, having even the remotest connection with the realty. *Holcroft v. Heel*, 1 B. & P. 400. *Campell v. Wilson*, 3 East 294. *White v. Palmer*, 4 Mass. 149. *Brown v. Wood*, 17 Mass. 68. 14 Mass. 49. 4 Mason 397. Many authorities, English and Amer-

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ican, are referred to in notes to 3 Kent 444. *Hurlbut v. Leonard*, Brayt. 201. *Mitchell v. Walker*, 2 Aik. 266. *Shumway v. Simons*, 1 Vt. 56. *Bullen v. Rannels*, 2 N. H. 255.

There is scarcely any fact, or right, which may not be affected by presumption. The right of a corporation to take toll on sale of corn in market was presumed from forty years practice. *Hill v. Smith*, 10 East 476. Although in England the statutes of limitations are held not to interrupt the rights of the crown, yet a grant from it may be presumed, even within the time of legal memory. *Mayor of Kingston upon Hull, v. Horner*, Cowp. 102. Ld. Mansfield said, in *Eldridge v. Knott*, Cowp. 215, on the authority of Ld. Coke, that an Act of Parliament may be presumed. Banking, turnpike and other corporations may be shewn to exist by presumption. *State v. Carr*, 5 N. H. 367. *Panton Turnpike Co. v. Bishop*, 11 Vt. 198.

The subdivision of towns into school districts and highway districts, and the organization of the former, with its officers and powers, may be shewn by usage and acquiescence. *Sherwin v. Bugbee*, 16 Vt. 443. *Dillingham v. Snow*, 5 Mass. 547. 11 Vt. 609. *Barnes v. Barnes*, 6 Vt. 393. A division of lands held in common into several lots is a proceeding specially provided for by statute, wherein is pointed out in detail the steps necessary to be taken. Yet it is much oftener proved by reputation, or acquiescence, than in any other way. Rarely, indeed, is a strictly statutory division shown in our courts.

But it is unnecessary to adduce other examples, which might be greatly extended, in order to evince the extensive application of the principle alluded to. That as cogent and weighty reasons exist in favor of its application to the subject of jail yard limits, as to most of those already mentioned, cannot be doubted. We are all satisfied, there is no substantial ground for making it an exception. It should rather appear, that a less amount of testimony would be requisite here, than in most other cases. Ordinarily the estate, right, or authority, is sought to be established directly in opposition to the admitted rights of others. In such cases, undoubtedly, a more severe and rigid rule ought to be adopted,—uninterrupted use for the requisite period, or unequivocal acquiescence.

When, however, the question arises collaterally, where no direct,

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permanent antagonism exists between the parties upon the point involved, and, above all, when the fact, to which the presumption is applied, is one mutually taken for granted in the transactions out of which the controversy arises, then the lowest amount of evidence suffices to establish it. Is this not a case of the latter description? A contract is entered into, growing out of the relation of creditor and debtor, sanctioned by law, by which the latter agrees to remain within certain circumscribed limits, until the debt is paid, or until authorized by law to depart therefrom. So far both parties assume, as an admitted fact, the existence of a territorial area, in reference to which such a contract may be legally made, a violation of which, on the part of the debtor, subjects him and his sureties to damages to the amount of the debt. True, this contract does not carry, on the face of it, a correct description of the territory. Neither may have any personal knowledge of the actual boundaries; both suppose them to be fixed by law, and susceptible of ascertainment. Both may be mistaken as to the fact of the existence of any such recognized area;—and what would be the result; why most clearly, as already stated, that the contract would fall to the ground for the want of any legal basis on which to rest. But here a somewhat different case occurs; no controversy exists as to the existence of the territory; but a dispute arises as to the exact boundaries of it, and that dispute involves the question, whether the contract has been broken, or not.

How is such a dispute to be adjusted? Not, certainly, by referring to any express clause in the contract, nor yet to any supposed intention of the parties. If capable of ascertainment by a resort to the records of the county court, as is ordinarily the case, then such resort must be had. If not, proof of general understanding and acquiescence of all concerned for thirty years, probably for fifteen, in certain recognized and well defined boundaries is equivalent to record proof. If the intention of the parties were of any consequence in this respect, it might well be presumed, they had reference to the same line of demarcation, which all others recognized and acted upon. 1 Vt. 181.

A case has been mentioned at the bar, decided in this court, in 1832, in Chittenden county, but not reported, which not only affords a direct authority for the decision we now make, but goes much be-

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yond it. The name of the case was *Prince v. Burnham et al.* I have been obligingly furnished with a short note of it, by HUTCHINSON, late Chief Justice, who was present when the decision was made. In that case it appeared that the jail limits were regularly laid out and established by the county court, and some rods exterior to one of the lines a pine tree stood, marked plainly with the letters G. L., indicating that it was on the line of the gaol limits;—but by whom these letters were cut, or when done, did not appear, although it was less than thirty years, but more than fifteen, before the alleged escape; and it appeared, that, from the time it was thus marked, the prisoners upon the limits had been accustomed to go to that tree, and treat it as one of the corners of the jail limits. A visit to this tree, by a prisoner on the limits, was decided not to be a breach of the jail bond. Here the liberties, as defined by record, were actually enlarged by usage to a considerable extent, so as, perhaps, to include more than four square miles, and in some form on that side, I should think, not easily susceptible of ascertainment. It is proper to add, that the court was not unanimous in that decision.

On the whole the judgment of the county court is affirmed.

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JOHN WOODBURY v. NATHAN PARKER.

An officer, who acts, in the sale of property upon execution, merely by force of his process cannot make a sale of such property to himself, and does not, by such attempted sale, acquire even a defeasable title to the property, good against all persons but the debtor and creditor.

It is doubtless true, that the parties conjointly, and perhaps the debtor alone, may authorize an officer, in such case, to become himself the purchaser of the property. ROYCE, J.

But where there is no offer to prove the assent of the debtor to such purchase by the officer, and the officer did not, after the sale, take and retain the possession of the property, his return upon the execution, showing a sale to himself, is not admissible evidence to show title in him to the property, even as against a mere trespasser, who is a stranger to all title, notwithstanding it appears, by the creditor's receipt upon the execution, that he has received from the officer the full amount at which the property was sold.

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TROVER for a pair of oxen. Plea, the general issue, and trial by jury, May Term, 1844.—HEBARD, J., presiding.

On trial the plaintiff, to prove title in himself to the oxen, offered in evidence an execution in favor of Solomon Downer against Jay Wilson and Hiram Wilson, which it was conceded was placed in the hands of the plaintiff, as deputy sheriff, for collection, and also the return of the plaintiff thereon, as deputy sheriff, from which it appeared, that the property in question was turned out to the plaintiff by Hiram Wilson, to be levied upon, and that the property was duly advertised for sale, and that at the sale the plaintiff was himself the highest bidder for the property and became the purchaser, and that the debtor who turned out the property was present at the sale. It also appeared, by the creditor's receipt upon the execution, that the full amount due upon the execution had been paid to him by the plaintiff. It appeared from the return, that the sale was made August 13, 1838; and the conversion of the property by the defendant was alleged to have been on the first day of September, 1839. The defendant objected to the return as evidence, upon the ground that it had no tendency to prove title in the plaintiff to the oxen; and it was excluded by the court.

Other testimony was introduced; and the case was submitted to the jury under a charge, to which no exceptions were taken.

Verdict for defendant. Exceptions by plaintiff.

J. Barrett and Tracy & Converse for plaintiff.

The question raised by the bill of exceptions is, whether the return on the execution was admissible, as tending to show title in the plaintiff to the oxen. His title was acquired by virtue of the sale evidenced by the return. The return was the proper evidence of such sale. 6 Vt. 64. 2 Vt. 181. A sale by an officer to himself is not *void*. It gives a good title, until impeached. The *mere fact* of his being both seller and buyer does not constitute such impeachment. He is treated in the cases as standing in the position of *trustee* for both debtor and creditor. The general principle, governing sales made by trustees, in which they purchase the property sold, is *not* that the sale is *void*, but that the purchase enures to the benefit of the *cestui que trust*, if he choose so to claim. *Hapgood v. Jennison*, 2 Vt. 294, 302, 305. *Davou v. Fanning*, 2 Johns. Ch. R. 252. A person not party to nor interested in the sale can-

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not question the title acquired by it. *Mead et ux. v. Byington et al.*, 10 Vt. 115, 122. *Jackson ex d. McCarty v. Van Dalsen*, 5 Johns. 43. *Jackson ex d. Colden v. Walsh*, 14 Johns. 406, 415. *Sheldon v. Sheldon*, 13 Johns. 220.

If it should be held to be incumbent upon the plaintiff to show the assent of the creditor and debtor to the sale, the return should be admitted, to show the subject matter of such assent, and as properly preceding the proof thereof. But we claim, that such assent will be presumed, and that, if advantage would be taken of the want of it, such want should be shown by the defendant.

A. P. Hunton for defendant.

The deputy sheriff could not sell to himself. *Mills v. Goodsell*, 5 Conn. 475. There must be two parties to every contract; Chit. on Cont. 9, 12; 2 Bl. Com. 442; 2 Kent 450; 1 Sw. Dig. 172, 173; 1 Pow. on Cont. 6, 7. A sale is a contract for the transfer of property from one to another. 2 Kent 468; 2 Bl. Com. 446; Chit. on Cont. 373; and mutual consent to it is requisite; 2 Kent 477; 1 Sw. Dig. 376. A sheriff holds chattels in trust; he has a special property therein, and a right to the possession; and his interest survives to his administrator; *Johnson v. Edson*, 2 Aik. 299; *Sewell v. Harrington*, 11 Vt. 141; *Hall v. Walbridge*, 2 Aik. 215. A person standing in a fiduciary relation cannot purchase the property, even of the person who has the beneficial interest in it; *Mead et ux. v. Byington et al.*, 10 Vt. 116; *Hapgood v. Jennison et al.*, 2 Vt. 294; *Adm'r of North v. Barnum*, 10 Vt. 220; 1 Story's Eq. 312, § 317; Ib. 316, § 321; 1 Madd. Ch. 111; Story on Bail. 213, § 319; *Oliver et ux. v. Court et al.*, 8 Price 127, [3 Excheq. R. 313, 331.] The reasons why a sheriff should not be permitted to become an absolute purchaser at his own sale are as strong as they can possibly be in any case. It is his duty to sell the property at auction for the best price that can be obtained. The mode of conducting the sale is mostly, and of necessity must be, in his discretion. He may so conduct as to injure both creditor and debtor, without any possibility of redress. He may make a return and thus prove his title, or neglect to make it, and prove title by parol; *Gates v. Gaines* 10 Vt. 346. No defect in his return, when made, or irregularity or impropriety in his proceedings, will affect his title; *Bates v. Carter*, 5 Vt. 602; *Adm'r of Janes v. Martin*, 7 Vt. 92;

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Hale v. Miller, 15 Vt. 211. Any one thinking himself aggrieved can sue the sheriff; Ib. And in case of a deputy, the bail can, as is usual, procure a discharge from the sheriff, and the question as to the misconduct of the officer can be tried by his own oath.

The case shows, that the defendant was neither debtor, nor creditor, in the execution. His claim, then, must have been as a subsequent purchaser, or attaching creditor; and having received the possession from the debtor, he stands in as favorable position as the debtor himself, having the possession.

If what was done amounted to a purchase from the debtor, or from both creditor and debtor, or if the plaintiff acquired a claim to the property by having paid the debt and thereby removed the lien of the creditor upon the property, or by having made himself liable for the debt, his title arose from no official act, and could not be proved by a return made by him.

The opinion of the court was delivered by

Royce, Ch. J. On trial the plaintiff, to show title to the property sued for, produced in evidence a writ of execution in favor of Solomon Downer against Jay Wilson and Hiram Wilson, together with his (the plaintiff's) return upon it, as a deputy sheriff, showing a levy upon the oxen, being the property of Hiram Wilson, and a sale of the same at auction to himself. The return was objected to, as not legally tending to show title, and was excluded by the court. The correctness of that decision is the only matter to be considered.

The case, by the bill of exceptions, is entirely bare of all other facts and circumstances; and the defendant appearing on the case, as brought here, in the character of a stranger to all title, it might seem, at first view, that the return did tend to show, at least, a lawful possession of the oxen, acquired by the levy upon them,—which would be a sufficient title on which to recover against a mere wrong doer. But since it appears that the case did not stop upon that evidence being rejected, and that other evidence was introduced, (though the nature or tendency of it is not given,) it should, doubtless, be understood, that no possession was in fact continued by the plaintiff until the time of the conversion by the defendant,—which is alleged to have happened between one and two years after the sale at auction. If the levy did not terminate in the trans-

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mission of a *title* to the plaintiff, it was abandoned, together with all actual or constructive possession connected with it.

The sole question, then, is, whether an officer, acting under legal process, can sell property to himself.

According to all the authorities, such an officer, in addition to his character as a minister of the law, is regarded as a sort of trustee and agent, both for the creditor and debtor. The two characters place him on higher and more responsible ground than a mere private trustee, or agent. And if the latter is not permitted to acquire a personal interest in the matter of his agency, much less should such indulgence be granted to the former.

It is urged, however, that he may take, at least, a defeasible title, good against all persons but the debtor and creditor. This is, indeed, the general rule in the case of a private agent and trustee. And it is doubtless true, that the parties conjointly, and perhaps the debtor alone, may authorize an *officer* to become himself the purchaser. In such a case, however, the purchase is virtually made from the debtor, with the creditor's assent,—if such assent is necessary. But so long as he acts without such concurrence of the parties, and merely by force of his process, the injunction against assuming such a personal interest should be stern and inflexible. To hold otherwise would be to place him under constant temptation to relax and violate his duty, in furtherance of selfish objects.

This is the view, which has been strongly expressed in *Mills v. Goodsell*, 5 Conn. 475, *Pierce v. Benjamin*, 14 Pick. 359, and *Perkins v. Thompson*, 3 N. H. 144. And we think the sound and just rule to be, that the process, of itself, does not empower the officer, to make a sale to himself; and that, without authority from the parties, (or the debtor, at least,) such an attempted sale involves an inconsistency and contradiction in terms, in supposing a party to contract with himself.

It follows, that, if the sale of an officer to himself is relied upon, it should appear to have been made with the assent and concurrence of those, whose interests were to be affected,—of both creditor and debtor according to the case of *Mills v. Goodsell*,—and of the debtor, at least, according to all the others. And since there was no offer, in the present case, to accompany the execution and return with proof of such assent, they were properly rejected.

Judgment affirmed.

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JOHN ADAMS v. ALFRED GAY.

A contract entered into upon Sunday is not a violation or in any way in contravention of the statute of this state, if entered into in another state.

Such contract is not so far *contra bonos mores* at common law, as not to form the proper subject matter of an action in the courts of this state.

The statute laws of another state, when relied upon as a defence to a contract upon the ground of its illegality, must be proved, upon the trial, like any other facts in the case, and cannot be supplied in the supreme court, by producing there the statute book of that state.

All contracts of a secular character, and which are not properly works of necessity, or charity, if finally consummated upon Sunday, are void under the statute of this state; so that, while matters remain in this condition, no action can be maintained, either upon the contract, or for any thing done under it, or growing out of it.

But contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts which are void for illegality. They are not tainted with any general illegality, but are illegal only as to the time in which they are entered into. It is not sufficient to avoid them, that they have grown out of a transaction upon Sunday; they must be finally closed upon that day. And although closed upon that day, yet if affirmed upon a subsequent day, they then become valid.

And in all cases of contracts entered into upon Sunday, if either party have done any thing in execution of the contract, it is competent for him, upon another day, to demand of the other party a return of the thing delivered, or, where that is impracticable, compensation; and if the other party refuse, the original contract becomes thereby affirmed, and the same rights and liabilities are induced, as if the contract had been made upon the latter day.

This is an indispensable exception to the general rule in regard to illegal contracts, in order to secure parties from fraud and overreaching, which would, otherwise, be practised upon Sunday by those who know their contracts are void, and that they are not liable *civiliiter* for even frauds practised upon that day.

TROVER for a certain bay mare. Plea, the general issue, and trial by jury, May Term, 1844,—HEBARD, J., presiding.

On trial the plaintiff introduced evidence tending to prove, that

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he exchanged horses with the defendant in July, 1842, the plaintiff delivering to the defendant the bay mare sued for, and the defendant delivering to the plaintiff a grey mare, which exchange was made on Sunday, a little after noon, at Surry in the State of New Hampshire; that the defendant, to induce the plaintiff to make the exchange, represented the grey mare to be "sound and right every way," and the plaintiff entered into the contract relying upon such representation; that afterwards, and during the same afternoon, the plaintiff discovered that the grey mare was unsound and badly diseased with the glanders; that the defendant, at the time of making such representation as to the soundness of the mare, knew it to be false; that during the same afternoon the plaintiff informed the defendant of the unsoundness of the grey mare, and requested him to re-exchange,—which the defendant declined doing; that upon another day, and within a reasonable time, the plaintiff tendered to the defendant the grey mare and demanded the bay mare; that the defendant refused to return the bay mare to the plaintiff, and thereupon the writ in this action was served upon him. The testimony also tended to prove that the grey mare was then abandoned by both parties, and that she died the ensuing winter.

The defendant requested the court to charge the jury, that if the exchange was made on Sunday, a little after noon, as the evidence tended to prove, the plaintiff was not entitled to recover.

But the court instructed the jury, that if they found, from the evidence, that the defendant made false representations in relation to the soundness of the grey mare, knowing them to be false, whereby the plaintiff was deceived and induced to make the exchange, and if the plaintiff tendered back the grey mare and demanded the bay mare, and the defendant refused to deliver the bay mare, the plaintiff was entitled to recover the value of the bay mare, notwithstanding the exchange was made upon Sunday, as the evidence tended to show.

Verdict for plaintiff. Exceptions by defendant.

I. W. Richardson and Tracy & Converse for defendant.

If the contract, upon which this action is founded, had been originally made in this state, no action could be maintained upon it. *Lyon v. Strong*, 6 Vt. 219. Nor could the plaintiff rescind the con-

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tract and maintain trover for the horse, as the contract for exchange was executed. The parties are *in pari delicto*, and this court would not lend its aid to assist either party. *Dixon v. Olmstead*, 9 Vt. 310. *Danforth v. Evans*, 16 Vt. 538. Sw. Dig. 412. 2 B. & P. 467. *Walker v. Ferrin*, 4 Vt. 523.

The statute of New Hampshire can have no other reasonable construction, than the one which has been given to the statute of this state in the case of *Lyon v. Strong*. Rev. St. of N. H. 167, §1. *Roby v. West et al.*, 4 N. H. 285. Ib. 153. 7 Greenl. 461. But if it is considered, that the statute of New Hampshire does not render the act of the parties unlawful, yet we insist, that this court is not bound to enforce a contract in this state, which is contrary to the policy of the laws of this state, although it may be valid in New Hampshire. 2 Kent. 455-458. *Lodge v. Phelps*, 1 Johns. Cas. 139. Story's Conf. of Laws 203, 215. *Greenwood v. Curtis*, 6 Mass. 358.

P. T. Washburn for plaintiff.

Independent of the *day*, on which the parties exchanged horses, the facts found entitle the plaintiff to recover. *Kimball v. Cunningham*, 4 Mass. 502.

In examining the case in reference to the alleged *illegality* attached to the contract, we contend;

I. That contracts made on Sunday are not void at common law; in other words, they are not *mala in se*, but *mala prohibita* merely. *Mackalley's Case*, 9 Co. 66. *Rex v. Brotherton*, 1 Str. 702. *Swann v. Broome*, 3 Burr. 1595. *Drury v. Defontaine*, 1 Taunt. 131. *Comyns v. Boyer*, Cro. Eliz. 485. *Smith v. Sparrow*, 4 Bing. 84, [13 E. C. L. 354.] *Rex v. Whitnash*, 7 B. & C. 596, [14 E. C. L. 100.] *Bloxsome v. Williams*, 3 B. & C. 232, [10 E. C. L. 60.] *Sayles v. Smith*, 12 Wend. 60. *Boynton v. Page*, 13 Wend. 429. *Story v. Elliott*, 8 Cow. 27. *Lovejoy v. Whipple*, 18 Vt. 379.

II. We are proceeding, then, upon a *disaffirmance* of a contract rendered illegal by *statute*,—that is, *malum prohibitum*; and notwithstanding the great number of reported cases upon the subject of illegal contracts, we believe that they may be all reduced to a few simple classes, under one or the other of which every case, apparently conflicting with our right of recovery in this case, may be brought, without interfering with one right.

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1. No action can be sustained upon an illegal contract, nor to enforce its execution, whether such contract be *malum in se*, or *malum prohibitum*. Every case, which has arisen in the courts of this state, on which the defendant relies, has been decided under this rule. *Badger v. Williams*, 1 D. Ch. 137. *Mattocks v. Owen*, 5 Vt. 42. *Hinesburgh v. Sumner et al.*, 9 Vt. 23. *Dixon v. Olmstead*, 9 Vt. 310. *Foote et al. v. Emerson*, 10 Vt. 344. *Lyon v. Strong*, 6 Vt. 219. *Danforth v. Evans*, 16 Vt. 538. *Elkins v. Parkhurst*, 17 Vt. 105. And see *Roby v. West et al.*, 4 N. H. 285; *Frost v. Hull*, Ib. 153; *Law v. Hodson*, 11 East 300; *Foster v. Taylor*, 3 Nev. & M. 244; *Wheeler v. Russell*, 17 Mass. 258.

2. If the contract be *malum in se*, that is, void at common law, no action will be sustained, either on the contract itself, or, on a disaffirmance of the contract, to recover back any consideration, which may have been paid by either party, or on any collateral branch, growing out of such contract. *Thurston v. Percival*, 1 Pick. 415. *Wanell v. Reed et al.*, 5 T. R. 599. *Chugas v. Penaluna*, 4 T. R. 466. *Biggs et al. v. Lawrence*, 3 T. R. 454. *Vandyck v. Hewitt*, 1 East 96. *Langton v. Hughes*, 1 M. & S. 593.

3. The only cases of contracts *mala prohibita* merely, to which the same rule has been extended, are cases, where, upon reasons of *policy* and public *expediency*, the *contract itself* has been prohibited, and its inception at any time, or under any circumstances, declared illegal. Ld. MANSFIELD, in *Clarke v. Shee et al.*, Cowp. 197. Under this class come the cases brought to recover back money won at play. And see *Lowry et al., v. Bourdieu*, Doug. 471.

4. But if the contract be *malum prohibitum* merely, the general rule is, that the *inequity* of the retention of the property or money advanced, by him who has received it, is considered greater than the statute *illegality* attached to the contract itself; and, upon a subsequent *affirmance* of the contract, or upon a *disaffirmance* of it, duly made and notified to the other party, the party making such advances may recover them back in any appropriate form of action. Ld. MANSFIELD, in *Holman v. Johnson*, Cowp. 343. PARK, J., in *Williams v. Paul*, 6 Bing. 653, [19 E. C. L. 193.] *Pickard v. Bonner*, Peake's Cas. 221. *Lacaussade v. White*, 7 T. R. 535. Ld. ALVANLEY, Ch. J., and HEATH, J., in *Tappenden et al. v. Randall*, 2 B. & P. 467. 2 Com. on Cont. 109. *Munt et al. v. Stokes*

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et al., 4 T. R. 561. *Ex parte Dyster*, 2 Rose's Bank Cas. 349. 2 M. & W. 159. *Johnson et al. v. Hudson*, 11 East 180. *Fitzroy v. Gwilliam*, 1 T. R. 153. Cowp. 792. *Astley v. Reynolds*, Str. 915. *Smith v. Bromley*, Doug. 696, (n. 3.) *Jones v. Barkley*, Doug. 695, (n. 3.) *Stock v. Mason*, 1 B. & P. 286. *Jackson v. Davison*, 4 B. & Ald. 691. *Rogers v. Kingston et al.*, 2 Bing. 441. *Jaques v. Golightly*, 2 Bl. R. 1073. *Jaques v. Withy et al.*, 1 H. Bl. 65. *Greenwood v. Curtis*, 6 Mass. 358. *Hunt v. Knickerbocker*, 5 Johns. 334. *Utica Ins. Co. v. Kipp*, 8 Cow. 20.

Of the class of cases which have arisen peculiarly from contracts made on *Sunday*, none can be found, which conflicts with our positions,—but rather the contrary. *Lyon v. Strong*, 6 Vt. 219, was an action in *affirmance* of the contract. So was *Fennel v. Ridder*, 5 B. & C. 406, and *Smith v. Sparrow*, 4 Bing. 84. Whenever the courts have been able, by giving to the statute the strictest construction it would bear, to uphold a contract made on *Sunday*, they have invariably done so. *Rex v. Whitnash*, 7 B. & C. 569, [14 E. C. L. 100.] *Drury v. Defontaine*, 1 Taunt. 131. *Blozsome v. Williams*, 3 B. & C. 232, [10 E. C. L. 60.] *Sayles v. Smith*, 12 Wend. 60. *Boynton v. Page*, 13 Wend. 425. *Williams v. Paul*, 6 Bing. 653, [19 E. C. L. 193.] *Payne v. Eden*, 3 Caine 217. *Williams, Ch. J., in Lyon v. Strong*, 6 Vt. 219. 5.96

III. The parties in this case are not in *pari delicto*. The bill of exceptions shows, that the defendant was guilty of such fraud in the exchange, as would, of itself, justify the plaintiff in treating the contract as void. F. N. B. 95. *Harris v. Bowdin*, 1 Cro. Eliz. 90. 1 Com. Dig. 230. 2 Com. on Cont. 123.

IV. But this case must, so far as the validity of the contract is concerned, be decided wholly upon the law of New Hampshire. *Harrison v. Edwards*, 12 Vt. 648. *Greenwood v. Curtis*, 6 Mass. 358. *Houghton v. Page*, 2 N. H. 42. It is therefore incumbent on the defendant to show, in some proper manner, that there existed in New Hampshire, at the time this contract was made, a statute law, which would render it illegal. This court will not, *ex officio*, take notice of the statute laws of another state. *Pickering v. Fisk*, 6 Vt. 102. The existence of such a statute law is a *fact*, which must be pleaded, if necessary, and *proved*, like any other fact. *Pickering v. Fisk, ub. sup.* *Haven v. Foster*, 9 Pick. 112. This court can

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only look at the bill of exceptions, for a statement of the evidence given by the defendant. *Adams v. Ellis*, 1 Aik. 24. *Richardson v. Denison*, 1 Aik. 210. *Eaton v. Houghton*, 1 Aik. 380. *Stearns v. Warner*, 2 Aik. 26. The bill of exceptions, in this case, shows no evidence of the existence of such statute law of New Hampshire, as having been given in the court below. And it is too late now for the defendant to supply such proof. *Blake et al. v. Tucker*, 12 Vt. 39. The court, therefore, will, and must, presume, that the decision of the court below was correct. *Mattocks v. Bellamy*, 8 Vt. 463. *Russell v. Fillmore*, 15 Vt. 130.

The opinion of the court was delivered by

REDFIELD, J. The facts necessary to be recapitulated here, are, that the plaintiff and defendant exchanged horses, in the State of New-Hampshire, upon Sunday. In that exchange the defendant was guilty of fraud and misrepresentation, as the jury have found in the case. This became known to the plaintiff upon the same day, and he requested the defendant to re-exchange, which he declined doing. Some days subsequently, and not upon Sunday, the plaintiff made the same request of the defendant, tendering back to him, at the time, the horse which he had received of him; but the defendant refused either to take back his own horse, or to surrender the plaintiff's. Whereupon this action was brought for the deceit and false warranty, in which the plaintiff recovered a verdict, under instructions from the court, that under the foregoing state of facts the defendant was liable for whatever damage the plaintiff sustained by his fraud and misrepresentation, or by any breach of warranty on his part. The defendant tendered a bill of exceptions, in regard to this part of the charge of the court, which was allowed, and the case brought here for revision. It did not appear, that there was any evidence given upon the trial of any statute in the state of New-Hampshire prohibiting secular labor upon Sunday.

I. The question first made is, whether the law of New-Hampshire, which at the date of this contract prohibited all secular labor upon Sunday, except such as is of necessity or charity, can be regarded in determining the present action; and to us it seems very clear that it cannot. 1. It is obvious, that whenever the law of any other state is relied upon, as varying the rights of the parties in

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any cause, the existence and provisions of that law must be shown in the course of the trial of the cause, the same as any other fact is proved. It may be true, and doubtless is, that courts do not ordinarily require proof of the existence, in foreign states, (where contracts may be made which are sued in our own courts,) of the very first principles of natural, moral, or commercial law. We should presume, perhaps, until the contrary were shown, that all civilized states regarded those fundamental laws of the social compact. And indeed, if it were shown, that a contract between our own citizens was made in a state where no law, by which the obligation of contracts could be enforced, existed, we should, I apprehend, uphold an action upon it, upon the ground that it was probably entered into with reference to some law, by which it might be enforced; else it would seem a very idle ceremony.

But beyond this, it is not easy to say that the courts of this country, or of England, have ever taken judicial notice of the laws of other countries. It has been often said by English judges, and often decided by the English courts, that they will not take judicial notice, that even the law of Scotland, or Ireland, is the same, upon any given subject, as the law of England. And it is the constant practice in all the courts in Westminster Hall, and in all the American States, to prove the unwritten laws of other states by witnesses, upon the stand, skilled in those laws. And I do not know, that it was ever held, in any country, that the courts could take judicial notice of the written laws of another state, and especially the criminal laws and internal police regulations of such state; such a law must always be proved by the production of the law itself, or of a properly authenticated copy.

2. It might be supposed, that the production of the statute of New-Hampshire in this court would be sufficient. But for many years this has been regarded as insufficient. This court sits merely as a court of error. We may, indeed, suspend the hearing, for the purpose of allowing an amendment in any part of the record of the court below, when any diminution is suggested. But no *fact* can be supplied in this court, even when proved by matter of record. *Blake v. Tucker*, 12 Vt. 39. Those cases, where the statutes of other states have been read in this court, to show the power of magistrates to take depositions there, have been, where this court takes

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judicial notice of such powers ; and consequently the statutes are read, like any other book of authority, to instruct the mind of the court. *Barron v. Pettes*, 18 Vt. 385.

II. The law of New-Hampshire, then, being out of the case, on account of its not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens to see such a contract enforced in a court of justice. That the English and American courts have long refused to uphold certain contracts, on account of their general pravity, admits of no doubt whatever. Of this class are contracts to secure an immoral end, or such as are based upon an immoral consideration. Such are contracts to procure the seduction of an innocent female, or contracts for future cohabitation, or to encourage or support one in prostitution, or to procure any one to commit a crime, or fraud, or any immorality. But no case can be found, I apprehend, which goes the length of declaring all contracts, made upon Sunday, of this class. And as we are now called upon to determine how far a contract made upon Sunday is, on that account, immoral, and so void, it becomes necessary to examine carefully the ground upon which we go. 1st. It is certain, that such a contract is not a violation or in any way in contravention of the statute of this state, if entered into in another state. 2d. It should be determined, whether such contracts are considered immoral at common law. Here the authorities are full. All the English cases carefully distinguish between contracts, which are of the "ordinary calling" of the parties, and such as are not in the "ordinary calling." The former, if made upon Sunday, are void; the latter not. This distinction is based upon the words of the English statute of 29 Car. II, ch. 7, § 1, which prohibits only work of one's "ordinary calling." And contracts, not within this prohibition, have always been held valid there. *Drury v. Defontaine*, 1 Taunt. 131; *King v. Inh. of Witnash*, 7 B. & C. 794; *Fennell v. Ridler*, 5 B. & C. 406; *Rez v. Brother-ton*, 1 Str. 702. And it is even now held in the English courts, that one, taking a contract upon Sunday, of one in his ordinary calling, may still maintain an action upon it, unless he at the time knew that it was of the "ordinary calling of the party." *Bloxsome v. Williams*, 3 B. & C. 292; 2 Stark. Ev. 245 in note, citing *Begbie*.

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v. Levy, 1 Cr. and & Jervis, Eng. Ex. R. 180. It is manifest, then, that, by the English courts, such contracts, when not within the prohibition of the statute, are not esteemed *contra bonos mores*, or in any other way invalid.

III. And I certainly feel some little reluctance in farther examining this case, upon this ground ; knowing, as I do, that there exists great diversity of opinion upon this subject ; and where the court are only to declare the law, it would seem sufficient, that no law exists, whereby such a contract has yet been held immoral. But opinions have somewhat altered, in regard to the strictness of the observance of the Lord's day, and possibly some might feel, that such a determination, as we here make, tends in some degree to relax that strictness. This we certainly have no desire to do. For whatever might be the feelings of any member of the court, in regard to the propriety of observing other days also, as religious fasts, or festivals, there could be but one opinion in regard to the strict observance of the Lord's day, among consistent christians.

But while sitting here to determine cases, we are to be mindful that our own feelings or private opinions upon religious matters, or those of others, have little to do with the results to which we should come. It is also to be remembered, that, in this State, full immunity for all religions, and no religion, is equally given by the fundamental law of the state. No man can be abridged of his perfect liberty in that respect. And while this does not forbid the legislature from passing general laws against blasphemy, the desecration of the Lord's day, and the disturbance of public worship, it does, impliedly at least, forbid the adoption of any law, which is not necessary for the quiet enjoyment of religious feeling and religious worship. So that all laws, which it is competent for the legislature to adopt, must have reference solely to preventing the disturbance of our citizens in their religious feelings or devotions. Beyond this, the constitution of the state absolutely prohibits any law. How, then, can it be said, that a contract made out of the state, upon Sunday, is any violation of the religious feelings or any infringement of the religious devotions of our citizens, any more than if made upon any other day ?

There is only one other ground, upon which, it seems to me, it could be seriously contended, that such a contract is immoral ;

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that is, that its enforcement here tends to shock the moral sense of the community. I have no doubt such is the fact in regard to a portion of the most serious minded, earnest, and strenuously religious of our citizens. And no one can doubt, that the feeling of so considerable and influential a portion of the citizens of the state is entitled to the highest consideration. But in making inquiry into the state of the moral feeling of the whole community, we must not forget, that, upon religious matters, it is almost infinitesimally divided. And before we could determine that any given cause shocked the moral feeling of the community, we must be able to find but one pervading feeling upon that subject,—so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now nothing is more absurd, to my mind, than to argue the existence of any such universal moral sentiment, in regard to the observance of Sunday. It is in no just sense a moral sentiment at all, which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit in the main, certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others.

But this will be best determined by the actual state of opinions among us, upon this subject. Some of our citizens are atheists, perhaps; a considerable number deists, or rationalists; and among Christians there is an almost infinite diversity of opinion in regard to this subject. The Irish catholic, who may have become a denizen of the republic, regards St. Patrick's day, perhaps, as the most sacred in the calendar. The French catholic is willing to labor every day in the year, almost, except on St. Peter's day. If he is well informed, and conscientious, he will hardly forget Good Friday, or Christmas, or Ash-Wednesday. The same is true, in regard to these latter days, with the consistent members of the church of England, or of the Lutheran church, or of the Greek church, if any such there be among us. Now all these regard Sunday; but not as more sacred than some other days. It is but in commemoration of the weekly recurrence of the Lord's day, the Resurrection. But Easter-day, which is the *annual* festival of the Lord's day, is truly the great day of the feast,—the Sunday of Sundays, the crowning

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festival of the year! And this, with Good-Friday, Ash-Wednesday, Christmas, and some few other prominent fasts and festivals, is most religiously observed in all the ancient churches; and in all the Lutheran churches,—which embrace Holland, Sweden and Denmark, Prussia and Germany, so far as they are protestant;—and in the English church and all its branches. And so are all the Sundays in the year, but with far less solemnity than the greater fasts and festivals above-named. In addition to this, it must be remembered that we have among us some Jews, perhaps, and some Seventh-day Baptists, who do not regard Sunday at all; and many of the Friends, who regard all days alike. This may all be very unwise or very unreasonable, in the estimation of some; but it is none the less true; and we must take things as they are. How, then, can it be said, that to enforce a contract made upon Sunday, out of the state, is shocking to the moral sense of the community? One might desire to have it so; and might possibly hope, or even believe, it will soon become so; but nothing, almost, would be more absurd, than to claim that it is so at the present time. As the case now stands, then, the plaintiff is clearly entitled to have judgment affirmed. But as the case has been fully argued upon the effect of the New Hampshire statute, and its existence was no doubt a conceded fact in the court below, and might now be stated in the bill of exceptions by the judge who tried the case, we should be sorry to determine the case against the defendant upon that ground. But as we would not delay the case to procure that amendment, unless, when procured, it would avail the defendant, we will proceed to examine that point.

IV. The New Hampshire statute is so much the same as our own, that we may consider the case, upon this point, the same as if the contract were made here. It has already been decided in this state, that a contract, *finally executed* upon Sunday, is void. *Lyon v. Strong*, 6 Vt. 219. But, when not fully closed upon that day, the contract is not void, because some of its terms might have been fixed upon that day, or, indeed, because most of the business, out of which the consideration for the contract arose, was transacted upon that day. *Lovejoy v. Whipple*, 18 Vt. 379. The contract is held to be void, upon the familiar principle, that all contracts made in contravention of an express statute—whether the sanctions of the statute are enforced by a penalty, or not—are void. The contract

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being void, it will follow, of course, that, so long as the matter remains in that state, no action can be maintained, either upon the contract, or for anything done under it, or growing out of it. So that, in the present case, the plaintiff could not, in the first instance and upon general principles, have maintained any action for the recovery of his own horse, or to recover damages for the fraud or false warranty of the defendant. This certainly is the general rule, in regard to contracts which are void for illegality.

But to this general rule there are many exceptions; and these exceptions are framed mainly by judicial construction, and are founded upon some superior policy to that general policy which dictated the rule itself. And it seems to the court, that, in the class of contracts now under consideration, there is a most urgent necessity so to administer this rule in regard to them, that it shall not be in the power of the reckless and irreligious to circumvent and defraud the unwary, under the guise of the sacredness of the time when their own injustice was perpetrated. We have little doubt such practices have already been attempted in some cases, and that it might become a not unfrequent resort of those who desired to effectually cut off all remedy for their own fraud and dishonesty. If the general rule of holding contracts, made upon Sunday, void, is, also, to shield the contracting parties from the consequences of their frauds, and to allow the dishonest and abandoned to retain whatever they may be able to get possession of under such contracts, and at the same time release them from all liability upon their own contracts, then the rule itself will be productive of infinite mischief and should be discarded at once. But with such qualifications, as the English courts have already hinted at, we think the rule a safe one. We think contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts, which are void for illegality. Such contracts are not tainted with any general illegality; they are illegal only as to the time in which they are entered into. When purged of this ingredient, they are like other contracts. Contracts of this kind are not void because they have grown out of a transaction upon Sunday. This is not sufficient to avoid them; they must be finally closed upon that day. And although closed upon that day, yet if affirmed upon a subsequent day, they then become valid. *Williams v. Paul, 6 Bing.*

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653. The same principle is distinctly recognized also in *Blozsome v. Williams*. And if it is competent to affirm a contract of this kind upon some other day, it follows, that there must be a very essential difference between such contracts and most other illegal contracts, which can never be so affirmed as to bind the parties. But we would choose not to leave it to the election of either party to disaffirm such a contract at will; for this, also, might lead to abuses. But in those cases, where the contract remains executory upon both sides, and was made upon Sunday, it is simply void, until subsequently affirmed by mutual consent. Where either party has done anything under such a contract, for which, of course, he would have no remedy under the contract, until it was subsequently affirmed, he may demand restitution of the thing, where that is practicable, —and where it is not, compensation; and thus he will put the other party to his election, whether to affirm or disaffirm the contract. If he decline to make restitution, or, when that is impracticable, compensation, this is, in fact, affirming the contract, and should be so held. In the present case, insisting upon retaining the fruits of the fraud, the defendant did in fact reaffirm the fraud itself, and must now be bound by its consequences, the same as if it was committed upon any other day.

This exception to the general rule of illegal contracts is reasonable and necessary, and goes upon the ground mainly of many others, which have been long recognized in courts of justice; that is, of relieving an oppressed party, and putting it in his power to visit the oppression upon the oppressor. It is upon this ground, that money paid for usury, for the insurance of lottery tickets, to procure the requisite number of creditors to sign the certificate of a bankrupt, and in some other cases, may be recovered back, notwithstanding the party paying the money is implicated, in some sense, in the illegal transaction, but not in the same sense with the one who thus receives the money. The one commits a wrong voluntarily; the other, by a kind of duress of circumstances, is compelled to submit to become the instrument of wrong, and so is denominated the oppressed party.

So, too, in regard to the present subject, the parties, in consenting to enter into the contract upon Sunday, were equally guilty. The law, therefore, will give neither party any advantage from the

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contract. But when one party has performed the contract on his part, and the other seeks, through his own violation of the statute and desecration of the Lord's day, to obtain a benefit without compensation, he becomes the oppressor, and the other the oppressed party; and it is upon this ground, in analogy to the principles above alluded to, that the court affords this relief, or redress. With this qualification the rule seems to us a salutary one, and without it to be almost insufferable.

We are fully sensible, that some portion of the reasoning, upon which we have made this case an exception to the general rule, if carried out to the fullest extent, would subvert the general rule, that neither party is entitled to redress in a court of justice for any injury sustained in consequence of entering into an illegal contract. But we do not consider this class of contracts as tainted with any such general corruption, as attaches to most cases of illegal contracts. If that were so, it would be impossible to defend many of the English decisions upon this subject, which we have here but followed out to their legitimate results. And in making this class of contracts an exception to the general rule, we are not sensible of departing more from the spirit of the rule, than has already been done, in allowing other exceptions, or than is necessary in allowing exceptions to most general rules.

As it is obvious, from the foregoing determinations, that the defendant is liable, in the present action, upon the facts found, the judgment below is affirmed.



DANIEL K. BATCHELDER v. SILAS WARREN.

A. delivered to B. certain property, consisting of stock for clock making, watches, watch materials, jewelry, &c., under an agreement in writing, by the terms of which it was stipulated, that B. should manufacture, repair and put in order the property, and that he might sell it, or exchange it for certain other descriptions of property specified, and that A. would take back all the property if requested after three years from the date of the contract, and before, if the parties could agree, or that, if A. should request,

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the whole property should be his at all times, and that, if B. should exchange the property for any description of property not authorized by the agreement, or should use any of the property, he should charge such property to himself and become responsible to pay for the same; and B. expressly agreed, that he would manufacture, repair and dispose of the property, as stipulated, and that, "having received pay for so doing, all the profit" should belong, together with the property, to A.; and it appeared, that B. received property under the contract, and that he was working and trading with the same, and that, while he was so doing, the property was attached by the defendant, as belonging to B., at the suit of a creditor of B.: And it was held, that A. had not so parted with his right to the immediate possession of the property, as to preclude him from sustaining an action of trover against the defendant therefor.

TROVER for a quantity of jewelry and other property. Plea, the general issue, with notice that the defendant, as deputy sheriff, on the fifth day of October, 1841, took the property in question, as belonging to John A. Batchelder, by virtue of writs of attachment against him. Trial by jury, March Term, 1845,—HEBARD, J., presiding.

On trial the plaintiff gave in evidence an agreement in writing between himself and John A. Batchelder, which was in these words;

Articles of agreement made and concluded this twenty-ninth day of September in the year of our Lord one thousand eight hundred and forty, between Daniel K. Batchelder of Boston, Mass., of the one part, and John A. Batchelder of Ludlow, Vt., of the other part.

The said Daniel K. Batchelder for the consideration hereinafter mentioned hath agreed, and doth hereby covenant promise and agree, that he will place certain articles of value of his property in the possession of the said John A. Batchelder, consisting in stock for clock making, watches and watch materials and other articles mentioned in this book, the stock for clocks to be manufactured, and the other articles to be repaired, put in order, sold, or exchanged, for the following merchandize, viz., harnesses, fire arms, watches, jewelry, vehicles of any description and watch materials, or stock for clocks, or silver ware, and real estate, all of which he will take back if requested after three years from this date, and before, if parties can agree, or if the said D. K. Batchelder shall request, it shall be his at all times either the articles delivered or the property for which such articles may be exchanged. And the said John A. Batchelder in consideration thereof hath agreed, and doth hereby covenant promise and agree, to take into his possession such articles of the property of the said D. K. Batchelder as the said D. K. shall see fit to place in his possession to manufacture, repair, sell, exchange, or return, and having received pay for so doing all the

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profit is to belong together with the property to the said D. K. Batchelder and at the expense of John A. Batchelder, and if the said John A. Batchelder shall exchange any of this property for any other merchandize or shall make use of any of the articles above mentioned he shall charge them against himself and become responsible to pay the money, otherwise it shall remain the said D. K. Batchelder's the same of which has the privilege of sending other property at any time he shall see fit, but all must be recorded in this book with the price to each article and whether it is to be disposed of repaired and returned.

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JOHN A. BATCHELDER.

There was annexed to the writing an invoice of the property delivered to John A. Batchelder. The plaintiff also gave evidence tending to prove, that John A. Batchelder received, under the contract, the property so invoiced, and that he was in possession of part of the same goods, named in the plaintiff's declaration and taken by the defendant from John A. Batchelder,—the residue of the goods so received having been sold or exchanged by John A. Batchelder in pursuance of the contract,—and that prior to and at the time of the defendant's attachment John A. Batchelder was working and trading with the property, thus in his possession, according to the terms of the contract.

This was all the evidence introduced by the plaintiff in reference to his right to the possession of the property, except testimony relating to a certain book named in his declaration, in reference to which no decision was made by the supreme court, and therefore the evidence need not be detailed here.

The counsel for the defendant insisted, upon this evidence, that, by the contract, the plaintiff parted with his right to the possession of the property for the term of three years, and that, that term not having expired at the commencement of this suit, the plaintiff was not entitled to sustain the action of trover; and the court so decided and directed a verdict for the defendant. Exceptions by plaintiff.

Richardson & Nicholson for plaintiff.

In the first place, two things are to be observed;—1. That, as there was no question of fraud made or submitted to the jury, none is now to be presumed; but on the contrary every thing is to be

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taken in good faith. 2. That it is not necessary now to inquire, whether this action could be sustained for all the converted articles; for if it lies for any of them, the verdict must be set aside and a new trial granted.

It appears by the case, that a portion of the articles attached, and which had been delivered by the plaintiff to John A. Batchelder, were in the hands of the latter unaltered, and held by him, under the written contract, at the time of the attachment. The plaintiff's original title to them is undisputed; and of this he could be divested only by gift or sale. Of a gift there is no pretence; nor does the writing furnish evidence that a sale was contemplated, except in two specified cases, viz: When John A. should personally use any of the articles intrusted to him, or should exchange them for other merchandize than such as he was particularly restricted to by the terms of the writing; neither of which contingencies appear to have happened.

But it is said, that the plaintiff had parted with the right of possession for a limited time, which had not expired; and that this is to be determined from the writing, which, though very inartificially drawn, it is contended on the part of the plaintiff is merely a bailment for hire, subject to be determined at the will of the plaintiff, and in the meantime constituting John A. the agent, or factor, of the plaintiff for certain purposes, and giving him no farther interest therein, than merely the compensation, to which he would be entitled for doing the business. It is true, that there are some expressions in the writing, which, taken alone, might give it a different aspect; but the whole must be considered together, and so as to give it the most full and entire effect.

But the defendant contends, that John A. was entitled to hold the property, even against the plaintiff himself, at least for three years from the date of the instrument. The plaintiff does not so understand it; but that John A. was not to be at liberty to throw up the agency and return the property upon the plaintiff within that period, unless both parties should agree thereto; but it was expressly stipulated, that, if the plaintiff requested, it should be his at all times; which can only mean, that it should be his wholly, absolutely, and free from any claim of possession to it on the part of John A.; for

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otherwise a request for what was confessedly his own would be insensible.

If this view be correct, it does not differ from an ordinary case of bailment of property, to be returned on demand; and it can scarcely be contended, that trover does not lie in favor of such bailors against any third person, who abstracts the property from the bailee and converts it to his own use,—the general ownership, in such cases, drawing to it the legal possession; See *Saund. R.* 47, note; *Dewell v. Moron et al.*, 1 *Taunt.* 391; *Stephens N. P.* 2675, Note 52; *Story on Bailments*, § 93; *Story on Agency*, § 438; and it is to be observed, that the case of *Bromley v. Cozwell*, 2 *B. & P.* 438, does not militate against it, being between bailor and bailee, and no conversion proved.

Nor is it an objection, that the bailee might have a special property and be able to sustain trover for the same article; for “*both the person in whom the general property is, and the person in whom the special property is, may maintain an action of trover for the conversion thereof by a stranger;*”—6 *Bacon’s Ab.*, *Trover*, 686,—and may proceed, until one or the other has obtained a judgment. *Id.* *Story on Bailments*, § 94.

Moreover, it is noticeable, that the leading case on the other side, *Gordon v. Harper*, 7 *T. R.* 9, supposes a residuum of interest in the bailee during the remainder of the term, which could in some, however small, degree be made available to the defendant, or the purchaser,—such as the continued use of the furniture, in that case, during the remainder of the term for which it was hired; and so of the piano forte, in the case of *Pain v. Whittaker*, 21 *E. C. L.* 390. But what beneficial interest could be sold here? Would the purchaser have the right, in lieu of his debtor, of selling and exchanging for the benefit of the plaintiff?

P. T. Washburn and Tracy & Converse for defendant.

1. The plaintiff had parted with his right to the possession of the property for a *definite term*, which had not expired at the time this action was commenced; and no steps had been taken by him to determine the bailment, or alter its conditions. In the written contract, after specifying the nature of the property, and that John A. was to *manufacture, repair, and put it in order*, there follows

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this clause,—“All which he (plaintiff) will take back, if requested, ‘after three years from this date, and before, if parties can agree, ‘or, if the said D. K. Batchelder (plaintiff) shall request, it shall ‘be his at all times,’ &c. Were this all, it would be conclusive for the defendant; for the making the *request*, mentioned in both these clauses, is a *condition precedent* to the right of the plaintiff to take back the property, or consider it “his at all times.” But a succeeding clause shows a farther condition, attached to the right of the plaintiff to resume the possession, and puts the case beyond all doubt. John A. Batchelder covenants to receive the property, and *manufacture, repair, &c.*, the same, “and, having received pay ‘for so doing, all the profit is to belong, together with the property,” to the plaintiff. The bill of exceptions shows, that John A. did receive the property, and that he exchanged some of it, and that, at the time of the attachment by defendant, he “was working and trading with the property,” “according to the terms of said contract.” Then a right to compensation for the labor, thus performed under the contract, had accrued to him, and, by the terms of the condition above recited, the plaintiff *could not resume the possession*, without first making payment therefor. The case shows, that no evidence was given by the plaintiff, that such payment had ever been made. In *Soper v. Sumner et al.*, 5 Vt. 274, the property sued for had been leased by the plaintiff to Clark, as whose it was attached, the plaintiff reserving the right to determine the bailment, *if he became dissatisfied, &c.*; and there was *no evidence*, that, “at the time of the attachment, he had become dissatisfied.” The court held, that the plaintiff could not sustain trespass against the attaching officer for the property; and WILLIAMS, Ch. J., says,—“It may be true, that he (plaintiff) had a right to put an end to the contract and resume the possession; but until he exercised this right, he could have no claim to the possession, or to any action for an injury to the possession.” The case of *Gordon v. Harper*, 7 T. R. 9, shows, that, in this respect, there is no distinction between the actions of *trespass* and *trover*, and that, under such circumstances, *neither action* can be sustained. And the case of *Walker v. McNaughton*, 16 Vt. 388, is directly in point.

This was not a conditional sale of the property to John A. Batchelder, and therefore the case of *Bigelow v. Huntley*, 8 Vt. 151, is

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not applicable. The first position, taken by the court in that case, was undoubtedly well founded; but the second position is directly opposed to the case of *Soper v. Sumner et al., ub. sup.*, and has been distinctly superseded in *Swift v. Moseley et al.*, 10 Vt. 208, and in *Grant v. King et al.*, 14 Vt. 367,—in both which cases it was held, that the act of a *stranger* would not entitle the bailor to consider the bailment as determined,—and is directly opposed by the case of *Fairbanks v. Phelps*, 22 Pick. 535, and *Wheeler v. Train*, 3 Pick. 255.

The opinion of the court was delivered by

KELLOGG, J. The only question, presented for the consideration of this court, arises upon the decision of the county court in relation to the *plaintiff's right to the possession* of the property. If it be true, as is assumed by the court below, that, by force of the contract, the plaintiff had parted with his right to the possession of the property for a term, which had not expired at the commencement of the plaintiff's suit, it is very manifest, that this suit cannot be maintained. For it is well settled law, that, to maintain the action of trover, which is founded upon property and possession, the plaintiff must have, at the time of the taking and conversion, either the actual possession, or the *right to immediate possession*. Now, whether the decision of the court below can be sustained must depend upon the construction of the contract between the plaintiff and John A. Batchelder.

By the terms of that contract it is very obvious, that the articles deposited by the plaintiff with John A. Batchelder, and such as he might receive in exchange, were at all times to be and remain the property of the plaintiff. By the terms of the contract it is stipulated, that the property might remain in the custody of John A. Batchelder for the period of three years, the plaintiff, however, reserving to himself the right, at all times, of putting an end to the bailment. The words of the contract, after the enumeration of the property bailed to John A. Batchelder, are “All of which he (the plaintiff) will take back, if requested, after three years, and before, if parties can agree, or if the said D. K. Batchelder shall request.” From these expressions it would seem to be quite obvious, that,

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while John A. Batchelder could not compel the plaintiff to take back the property and put an end to the bailment before the expiration of the three years, yet, if the parties should agree, or if the plaintiff should desire it, he could at any and all times, upon his own mere will and pleasure, resume the actual custody and possession of the property.

We have been referred to the case of *Soper v. Samner*, 5 Vt. 274, as decisive of the case at bar; but we think that case clearly distinguishable from the present. In the case cited, by the terms of the contract, Soper had a right, if at any time he "should become dissatisfied with the manner of keeping or using the oxen, to take them back." This was not an absolute and unqualified authority to Soper, to take back the property at his mere pleasure; but it was only in the event of his becoming dissatisfied with the manner of keeping and using the oxen. He could not claim it as a right, unless his dissatisfaction was founded upon good and justifiable cause. No such restriction is imposed upon the plaintiff by the contract in the case at bar. He had a right to put an end to the bailment at pleasure, and consequently was entitled to immediate possession of the property.

The case of *Putnam v. Wyley*, 8 Johns. 432, is an authority that fully sustains this position. The court say, that the plaintiff, at the time of the alleged taking of the property, "must have such a right, as to be entitled to reduce the goods to actual possession when he pleases." The doctrine of the case last cited is believed to be well sustained and conceded to be sound law. Indeed, we are not aware, that it has ever been doubted, but what the owner might maintain trover for the taking and conversion of the property, provided he was entitled to the immediate possession at the time of the conversion.

The county court adjudged, that, by the contract, the plaintiff had parted with the property for three years, which had not expired at the commencement of this suit. This, we think, was clearly erroneous. The terms of the contract do not warrant that construction, but, on the contrary, by the very terms of the contract, the plaintiff was entitled to reduce the property to actual possession, when he pleased.

The result is, that the judgment of the county court must be reversed.

Wetherbee v. Ellison.

ENOCH WETHERBEE v. ADOLPHUS ELLISON.

The manure of animals, made upon a farm, whether spread about the barn yard, or lying in piles at the stable windows, or lying in the stables, where it has been suffered to accumulate, will pass by a deed of the freehold, as appurtenant to it.

And the tenant will have no right to remove the manure, notwithstanding he owned the crops from which it was made, if it appear that the crops were the product of the farm; in such case the rules of good husbandry require, that the manure should be expended upon the farm.

And where the defendant, who was in the occupancy of the farm, as tenant, at the time of the conveyance of the farm by the owner of the fee to the plaintiff, subsequent to that conveyance removed from the farm the manure which he had before suffered to accumulate in the stable, it was held, that, even upon the supposition, that, as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet, in the absence of any notice, either *actual*, or *constructive*, to the plaintiff, of this right, the defendant's intention to remove it, at the time he piled it in the stable, could not affect the plaintiff's right to it, unless that intention was manifested by some act, sufficient to put the plaintiff upon inquiry at the time of his purchase.

TRESPASS for taking thirty loads of manure. Plea, the general issue, and trial by jury, November Term, 1844,—HEBARD, J., presiding.

On trial the plaintiff gave in evidence a deed to himself of the farm from which the manure was taken, dated February 6, 1844, and also gave evidence tending to prove, that, at the time the deed was executed, there was upon the farm, in a stable, which had been used for a hog pen, a quantity of manure, which the defendant subsequently took from the farm.

The defendant gave evidence tending to prove, that he had formerly owned the farm, and that he occupied it during the year 1843, and that the manure in question was made by his cattle and hogs, from crops raised by him on the farm during that year, and that he piled up the manure in the stables where the cattle stood, and took it from the stables and carried it off the farm, without throwing or placing it, in any manner, upon the plaintiff's land.

The plaintiff requested the court to charge the jury, that, if the

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defendant took the manure from the farm after the plaintiff purchased it, even if the manure had not been removed from the stables until it was loaded to be taken away, the plaintiff was entitled to recover the value of the manure so taken. But the court instructed the jury, that, if the defendant kept the manure in the stables, intending to remove it from the farm, and did remove it without throwing it upon the plaintiff's land, the plaintiff could not recover.

Verdict for defendant. Exceptions by plaintiff.

S. Fullam for plaintiff.

The plaintiff insists, that manure in a stable and hog pen passes by the deed with the land upon which it is situated, as well as manure made on the land, after the execution of the deed, from the crops previously raised thereon. *Stone v. Proctor*, 2 D. Ch. 108. *Ripley v. Paige*, 12 Vt. 353. The question as to the defendant's intention to remove the manure has nothing to do with the case.

O. P. Chandler for defendant.

There is no pretence, that the manure was not the property of the defendant, unless it had become part of the realty by being thrown upon the stable floor in the manner detailed. We insist, that this comes within no principle ever recognized in law; and that manure no more becomes a part of the realty, in such case, than would grain, or potatoes, if thrown into a corner of the stable, for the purpose of being afterwards removed. *Stone v. Proctor*, 2 D. Ch. 108.

The opinion of the court was delivered by

KELLOGG, J. The principle may be regarded as well settled in this state, that the manure of animals, spread about the barn yard, or laying in piles at the stable windows, is so attached to the land, that it passes, by a deed of the real estate, to the grantee. It was so held by this court in the case of *Stone v. Proctor*, 2 D. Ch. 108; and this would seem to be decisive of the present case, unless the situation of the manure, at the time of the conveyance of the freehold to the plaintiff, was such as to materially vary it from the case of *Stone v. Proctor*. Now we cannot perceive any substantial differ-

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ence, as it respects the rights of the owner of the freehold to the manure, whether the same is in the yard, or at the stable windows, or in the stable, where the same has been suffered to accumulate. The same would, in either case, pass by a deed of the freehold, as appurtenant to it.

But it is urged, that the manure in question was made from hay which belonged to the defendant, and that therefore he had the right to remove it. This, we apprehend, does not, under the circumstances of the case, give the defendant the right he claims of removing the manure. It appears, that the defendant occupied the farm the year preceding the removal of the manure, as a tenant; and, as we understand from the bill of exceptions, the manure was made from the crops raised upon the farm; which the rules of good husbandry required should be used and expended upon and about the farm. Under such circumstances, in the absence of any agreement authorizing it, he would not have a right to remove the manure from the farm.

The court below seem to have attached importance to the fact of the defendant's *intention*, by keeping the manure in the stables, to remove it, and to have so instructed the jury. This, we think, unqualified and unexplained, was clearly erroneous. Even upon the supposition, that, as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet in the absence of any notice, either *actual*, or *constructive*, to the plaintiff, of this right, the defendants *intention* to remove it could not affect the plaintiff's right to the manure, unless that intention was *manifested* by some *act*, sufficient to put the plaintiff upon inquiry, at the time of his purchase.

Upon the whole, we are of opinion that the instructions to the jury were wrong; and consequently the judgment of the county court must be reversed.

Adams v. Dunklee. Sargeant v. Adams et al.

LUTHER ADAMS v. REUBEN B. DUNKLEE,
and
BENJAMIN B. SARGEANT v. LUTHER ADAMS AND SIMEON SHERWIN.

Where A. conveyed to B. certain premises for the life of B. and his wife, reserving to himself the right to possess and cultivate the premises for the purpose of enabling him to perform certain covenants upon his part for the support of B. and his wife, and B. subsequently recovered judgment in an action of ejectment against A. for a breach of those covenants, upon which no writ of possession was taken out, it was held, that the judgment terminated A's right to the possession of the premises, and that, if he still undertook to manage the farm, directly, or indirectly, without some new license, he did so as a wrong doer, and acquired thereby no right to the crops raised upon the farm, as against B., or the holder of B's title.

And the granting part, or premises, of the deed having conveyed the farm to B. "for and during his natural life and the life" of his wife, the *habendum* being to B. and his wife, naming her, it was held, that the wife did not take an estate in remainder, after the death of B., but that the entire estate vested in B. for his own life and that of his wife, and that, upon his decease, his administrator became the trustee and holder of the title, for the benefit of the wife.

No one can take an immediate and present estate under a deed, who is not named as a grantee in the premises, or granting part, of the deed, provided any one is there named; if no one is there named, the grantee may be ascertained from other parts of the deed.

And it is not unusual for the premises to give the quantity of estate granted; and when this is done, the grantee named in the premises at once takes the entire estate described; and any limitation in the *habendum*, designed to abridge, or lessen, such estate of the immediate grantee, in favor of a party not named in the premises, will be treated as repugnant and inoperative.

And judgment, in this case, having been recovered by B., in his life time, against A., in an action of ejectment, for a breach by A. of certain conditions under which he was to retain the possession of the farm, and A. having subsequently assumed to manage and cultivate the farm, it was held, that A. acquired no title or attachable interest in the crops thus raised by him upon the farm, and that the administrator of B. might maintain replevin against A. for the crops thus raised, and that an officer, who had attached the crops as the property of A., could not sustain trover against the administrator of B. for taking and carrying away the crops by virtue of his writ of replevin.

Adams v. Dunklee. Sargeant v. Adams et al.

THE case of *Adams v. Dunklee* was replevin for a quantity of rye and oats in the straw and corn in the stalk. Plea, not guilty, and trial by the jury, March Term, 1845,—HEBARD, J., presiding.

On trial the plaintiff gave in evidence an indenture, executed by the defendant and Timothy Olcott, by which the defendant leased to Olcott, “for and during his natural life and the life of Hannah Olcott, his wife,” a certain farm in Chester, reserving the right to occupy and improve the same, for the purpose of enabling him to perform certain covenants upon his part, contained in the indenture, for the support of Olcott and his wife; and the *habendum* was in these words:—“To have and to hold the above described premises, with the appurtenances, to them, the said Timothy Olcott and Hannah Olcott, for and during their and each of their natural life, to their use and benefit during said term.”

The plaintiff also proved the following facts. At the February Term of the supreme court in Windsor county, in 1844, Olcott recovered judgment against Dunklee in an action of ejectment, for a breach of the covenants for support contained in the indenture. On the thirtieth day of March, 1844, Olcott deceased, leaving a will, in which one Edson was appointed executor. Afterwards, Edson having declined the trust, Adams, the plaintiff in the replevin, was appointed administrator with the will annexed. At the time of recovering the judgment in the action of ejectment both Olcott and Dunklee resided upon the farm, and Dunklee and the widow of Olcott continued to reside there at the time these suits were commenced; and no writ of possession had ever been taken out upon the judgment; but the costs had been paid by Dunklee. The property replevied was raised upon the farm by one Daniel Davis, in the summer of 1844, under an agreement with Dunklee, by which the produce was to be divided between them. Edson informed Davis, after the decease of Olcott, and before he declined to act as executor, that, if he occupied the farm, it must be as tenant to Edson.

It also appeared, that the property in question had been attached by one Sargeant, a constable, as the property of Dunklee, by leaving a copy at the town clerk's office; and the second case above named,—*Sargeant v. Adams & Sherwin*,—was trover for the same property, brought by the constable, the alleged conversion being the taking of the property by virtue of the writ of replevin, which was

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served by Sherwin. This suit, also, was tried by jury upon the general issue, March Term, 1845,—HEBARD, J., presiding,—and the same facts appeared, as to the title of Adams to the property, as were shown in the action of replevin.

The court directed the jury to return a verdict for the defendant in the action of replevin, and for the plaintiff in the action of trover. Exceptions were taken to the decision in both cases; and the two cases were heard together in the supreme court.

L. Adams for the plaintiff in the action of replevin, and for the defendants in the action of trover.

The legal title to the farm, on which the grain was raised, was in the administrator of Olcott, together with the right of immediate possession. For the title, which Olcott recovered in the action of ejectment, did not end at his death, but remained as security for all damages sustained by reason of the neglect of Dunklee to fulfil the covenants in the indenture.

The construction given to the indenture and the judgment in ejectment by the court below,—which was, that Olcott's title ended at his death and thereby Dunklee was in as of his former right,—is directly in conflict with well settled general principles; such as that a person, not named in the premises of a deed, cannot take by the *habendum*. *Doe d. Timmis v. Steele et al.*, 4 Ad. & El. [45 E. C. L.] 663, explaining *Spyve v. Topham*, 3 East 115. 2 Bac. Ab. 494, 498. *Chamberlain v. Crane*, 1 N. H. 64. 12 E. C. L. 359. The whole estate is given to Olcott in the premises, not only for his own life, but for the life of his wife; his wife did not sign the deed; and the attempted covenants to her are absolutely void. 1 Chit. Pl. 3, 4, and note (g.) *How v. How*, 1 N. H. 49.

If we are correct in our first position, it follows, that Dunklee must be regarded as a trespasser in remaining on the farm. *Gilb. Ev.* 242. 2 Bl. Com. 146, note (m.) 1 Price 50. *Green v. Biddle*, 5 U. S. Cond. R. 384. 10 Vt. 504. *Birch v. Wright*, 1 T. R. 373. 1 Chit. Pr. 92, 161, 258, 752. 4 Vt. 327. 2 Kent 361, 362. *Taunton v. Costar*, 7 T. R. 431. *Bridges v. Smyth*, 15 E. C. L. 481. *Upton v. Witherwick*, 11 E. C. L. 8. 1 Cov. & H. Dig. 466. 1 Hilliard 9, 189. 3 Cruise 431. The produce of the farm never vested in Dunklee; but the legal title was to remain in Olcott during the continuance of the life estate.

Adams v. Dunklee. Sergeant v. Adams et al.

N. Richardson and *J. Barrett* for defendant in replevin and plaintiff in the action of trover.

1. The administrator, if he took any interest in the land, had no right to seize the crops which Dunklee had raised upon it; they were raised by him in good faith; Olcott had permitted him to go on, under their contract, after the recovery in ejectment, and he was, at least, such a tenant, as to be entitled to the crops.

2. The administrator took no estate or interest in the real estate. In the ejectment Olcott recovered according to his right; Rev. St. c. 35, § 6; his right was a contingent life estate; *Olcott v. Dunklee*, 16 Vt. 478; and after his decease, his wife, Hannah Olcott, took by remainder in her own right. 1 Shep. Touch. 75, 76. *Spyve v. Topham*, 3 East 115. Cro. Jac. 372, 563, 564. Co. Lit. 7 a, and note 33. Vin. Ab. F, 52, 53. 4 Com. Dig. 168. Dunklee remained in possession, furnishing the support for Mrs. Olcott, and is in under the contract with her, and is the owner of the property attached.

The opinion of the court was delivered by

Royce, Ch. J. The case of *Adams v. Dunklee* was replevin for a quantity of rye and oats in the straw,—and that of *Sergeant v. Adams* and *Sherwin* was trover for the same property. Sergeant, as an officer, had attached it on several writs of attachment against Dunklee, and the conversion complained of was the subsequent taking under the writ of replevin, which was served by Sherwin.

The action of replevin was prosecuted to a trial, and terminated in a judgment in favor of Dunklee, on the ground that Adams, the plaintiff therein, did not own the property replevied. The action of trover also terminated in a judgment in favor of Sergeant. Exceptions were taken in both cases, and they are now submitted together.

In reference to the action of replevin it is sufficient to remark, that it was brought and prosecuted as an adversary suit, founded on an alleged right of property in Adams. That right was negatived by the judgment of the county court, and no question is reserved in the case, except the question of property in Adams. That question is alike decisive of both cases.

The controversy in these suits has grown out of the different

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constructions, which the parties have given to a certain life-lease executed by Dunklee to one Timothy Olcott, who is now dead, and whom Adams represents, as administrator. That instrument was the subject of protracted litigation between Olcott, in his lifetime, and Dunklee, as to their respective rights and estates under it. And it was finally settled, that, while Olcott took and retained a freehold, or life estate, Dunklee had only a right of possession, as incident to his covenants to manage and carry on the farm, and furnish the stipulated support to Olcott and his wife from the avails of the farm. His right so to occupy and possess was regarded simply as the means of enabling him to perform his covenants. And hence it was considered, that, when he violated his covenants touching the support, his right to occupy and possess was *ipso facto* determined. Olcott was accordingly allowed to recover the farm in an action of ejectment against Dunklee. See *Olcott v. Dunklee*, 16 Vt. 478.

The crops claimed in these conflicting suits were raised upon the farm by one Davis, after final judgment in the action of ejectment, (upon which judgment no writ of possession was ever issued,) and after the death of Olcott. Davis had been told by Edson, the person named as executor in Olcott's will, that if he cultivated any part of the farm, he must do so as a tenant under him. Edson soon afterwards declined to accept the office of executor, and Adams was appointed administrator with the will annexed. But in the mean time Dunklee contracted with Davis to cultivate a portion of the farm upon shares under him, and Davis accordingly proceeded to raise the crops now in question.

Upon the foregoing facts the question arises, whether Dunklee acquired any interest in these crops, as against Adams, the administrator. The judgment in ejectment had already terminated Dunklee's right of possession; and if he undertook still to manage the farm, directly or indirectly, without some new license for the purpose, he did so without right and as a wrong doer. And we think he acquired no right by such wrongful interference, which could stand against the claims of the Olcott title, which is admitted still to exist. The consequence is, that Adams, and not Dunklee, was entitled to claim the crops in dispute, provided he was the legal trustee and holder of the Olcott title. It is insisted that he was not; but that, upon the death of Olcott, that title passed to his widow, who is

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still living. And if this be so, it must follow, that the action of replevin was unfounded, and that the other action should be sustained upon the possession of Sergeant, the officer, though Dunklee had no attachable interest in the property, and though the attachment should be deemed a trespass upon the widow's rights.

The remaining question, then, relates to the Olcott title, as between the widow and the administrator. And this must depend on the construction of the lease, or conveyance, from Dunklee to Olcott, before mentioned. That "indenture, bargain, or lease," as it is called, professes to be between Dunklee of the first part, and Olcott of the second part; and Dunklee, for the expressed consideration of two thousand dollars received of Olcott, "doth by these presents let and lease to him the said Timothy Olcott, *for and during his natural life, and the life of Hannah Olcott his wife*, all that certain farm," &c.—"To have and to hold the above described premises, with the appurtenances, *to him the said Timothy Olcott, and Hannah Olcott*, for and during their, and each of their, natural life, to their use and benefit during said term." The question is, whether Timothy Olcott took an estate for both lives, or whether a contingent remainder was created for Hannah Olcott, which became vested on the death of her husband.

It may be remarked, that the rules for the structure and exposition of deeds of conveyance are emphatically of the artificial and technical class, and must depend upon authority. And by those rules the premises, or granting part, of a deed is that which passes the estate from the grantor, and usually vests it in the grantee. And hence it is universally acknowledged, that no one can take an immediate or present estate under the deed, who is not named as a grantee in the premises, provided any one is therein named; if no one is there named, the grantee may be ascertained from other parts of the deed. But it is not required, that the quantity of estate granted should be mentioned in the premises, and much less that any intended qualifications or limitations of it should be there mentioned; all this may be left to be fixed and determined by the *habendum* clause in the deed. It is not unusual, however, for the premises to give the quantity of estate granted. And when this is done, it appears to be settled, that the grantee named in the premises at once takes the entire estate described; and that any limitation in the

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habendum designed to abridge or lessen such estate of the immediate grantee, in favor of a party not named in the premises, shall be treated as repugnant and inoperative. The authorities cited to these points sufficiently confirm the rules I have here stated. The case of *Spyve v. Topham*, 3 East 115, is urged in argument, as having held a different doctrine. But the question there was, whether the indenture had been rendered void by the insertion of a wrong name in the premises. And the court merely rejected the name in that place as surplusage, and gave effect to the deed as if no name had appeared in the premises.

Here the immediate grant in the premises is to Timothy Olcott for his own life and the life of his wife. The entire estate for both lives is thus granted to him in the first instance; and to hold that the wife took in remainder after his death would be to abridge and lessen the estate once vested in him. And as the weight of authority is decidedly opposed to such a construction of the deed, we do not feel at liberty to adopt it.

The result is, that judgment in both cases must be reversed.



CYRUS DOLBEAR v. TOWN OF HANCOCK.

No authority to serve a process can be conferred upon one, who has not power by statute for that purpose, without a judicial act of the magistrate who signs the process.

Where a writ, returnable to the county court, was directed, by the magistrate who signed it, in these words,—“To any sheriff or constable in the state, or to E. K. Gladding, constable of Granville,” omitting to state therein the statute reasons for making a special authorization, and the writ was served by Gladding out of the town of which he was constable, it was held, that the service made by him was void.

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And the county court have no power to permit the magistrate, who signed the writ, to amend the direction, after the case has been entered in court, by inserting therein the statute reasons for making the authorization; and the affidavit of the magistrate, that he omitted the requisite matter by mistake, can have no effect.

IN THIS CASE the original writ, which was returnable to the county court, November Term, 1842, was signed by a justice of the peace, and was directed in these words;—"To any sheriff or constable in the state, or to E. K. Gladding, constable of Granville;" and the service was made by Gladding out of the town of which he was constable. At the term at which the case was entered in court the defendants pleaded in abatement, that the writ was not served by any officer or other person by law authorized to serve it. Upon this plea issue was joined; and at the same time the plaintiff moved for leave to amend the process, by inserting, in the direction of the writ, that no proper officer could be seasonably had to serve it, and that the person, to whom it was directed, was an indifferent person. To the allowance of this amendment the defendants objected. The plaintiff then offered the affidavit of the justice of the peace, who signed the writ, stating, that he knew, at the time of signing the writ, that Gladding had no power, as constable of Granville, to serve it, and that he intended to authorize him, as a disinterested person, to serve it, for the reason that no proper officer could be seasonably had, and that he supposed, at the time, that the writ was properly directed for that purpose. The defendants objected to this testimony, as irrelevant; but the court received the affidavit, and permitted the plaintiff to amend. Exceptions by defendants. Upon the general issue, subsequently joined in the case, judgment was rendered for the plaintiff.

C. Coolidge for defendants.

1. There was a total want of authority in the person named in the process to serve it; he had no such authority as constable, and the words "constable of Granville" are mere surplusage. The process is the same, then, as if directed "to E. K. Gladding." A direction to one, by his name only, who has not official authority, confers none. The appointing one to serve legal process, who is not, by virtue of his office, authorized so to do, is a judicial act.

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Bebec v. Steel, 2 Vt. 314. *Kellogg, ex parte*, 6 Vt. 509. *Kelly v. Paris*, 10 Vt. 261. *Ross v. Fuller*, 12 Vt. 265.

2. The amendment was improperly allowed. There was nothing to amend by; the process was utterly void. *Hearsey v. Bradbury*, 9 Mass. 95. *Campbell v. Stiles*, Ib. 207. *Wood v. Ross*, 11 Ib. 271. *Brier v. Woodbury*, 1 Pick. 362, 366. *Eno v. Frisbie*, 5 Day 122.

3. The testimony of the justice, who signed the writ, was inadmissible. The act of the person assuming to make service was inoperative and void, *when done*, for the want of authority in him to do it. No such act can be made valid by relation, or intendment.

A. P. Hunton and R. Walker for plaintiff.

1. The amendment was properly allowed. The rule in this state is, that "any of the courts" "may at any time permit either of the parties to amend any defect in the process, or pleadings." 1 Tol. St. 74. Rev. St. 161. To this rule there is no exception. *Mattocks v. Stearns et ux.*, 9 Vt. 326. *Sherman v. Prop. of Conn. River Bridge*, 11 Mass. 338. In *Chadwick v. Divol*, 12 Vt. 499, the writ was served by a sheriff, to whom it was not directed, and the court allowed it to be amended. And the same was done in *Hersey v. Bradbury*, 9 Mass. 95.

2. The court did not err in admitting the testimony. If any doubt existed, after inspection of the record, as to the facts, it was proper that it should be removed by extrinsic evidence. *Richardson v. Mellish*, 3 Bing. 334. [11 E. C. L. 127.] 3 Bl. Com. 410. *Wynne v. Thomas*, Willes 563, 570.

3. The process was sufficient, without amendment. It is not necessary that either of the facts should be stated in the direction of a writ, which must be found by the magistrate signing it, before authorizing a person to serve it. *Bell v. Chipman*, 2 Tyl. 423. *Milner v. Hayes et al.*, Bray. 21. Rev. St. 180, § 7; 484, Form 3; 179, § 6. 1 Sw. Dig. 610. A justice must find the same facts, before authorizing a person to serve process returnable before himself; but they need not appear upon the process; Rev. St. 171, § 22. A *subpæna ad testificandum* formerly contained a direction to an indifferent person, naming him, but stated no want of an officer; Slade's St. 323; it is now in common form; Rev. St. 490; yet the

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provisions of the law are not altered. Slade's St. 132, § 26; Rev. St. 176, § 65. In the direction of each of the two warrants, in proceedings for the removal of a pauper, a fact is stated; Slade's St. 324, 325; Rev. St. 500, 501; yet none is required to be found; Rev. St. 102, § 4. In the direction of a warrant for commitment of a person refusing to make a deposition no fact was stated, though a person was named; Slade's St. 331; yet it was required that a fact should be found; Slade's St. 82, § 82; it is now in common form; Rev. St. 495. The direction of a citation to a party to attend the taking of a deposition stated only that the person to serve it was indifferent; Slade's St. 82; Rev. St. 497; yet the justice was required to find every fact necessary in this case. Rev. St. 204, § 3; Ib. 171, § 22; Ib. 180, § 7.

The opinion of the court was delivered by

Royce, Ch. J. This case is presented on exceptions taken in the county court in reference to a plea in abatement. The ground of the plea was, that the writ was served by a person possessing no authority to make the service, either as a public officer, or by special appointment. The direction was to any sheriff or constable, &c., "or to E. K. Gladding, constable of Granville." The plaintiff moved, that the magistrate, who signed the writ, should be permitted to insert the statute grounds for making a special direction of the writ, and also for selecting the person named. This was permitted by the court; and the ground of abatement was treated as being thereby removed. To this course the defendants excepted; and they still insist upon their plea.

The sole question is, whether the court erred, in attempting to cure the defect in the manner stated.

It is needless to say, that the affidavit of the magistrate, that he omitted the requisite matter by mistake, should have no influence on the question. The case seems to have little analogy to that of *Chadwick v. Divoll*, 12 Vt. 499, where the writ was served by a public officer, to whom it had not been previously directed. To render that case an authority for this, it should have appeared, not only that the court allowed a direction to the officer to be inserted in the writ after service made, but that the officer was appointed to his office after he had attempted to serve the writ. Here there was

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neither a general nor special authority, when the pretended service was made; and without a judicial act of the magistrate no authority could be conferred. *Kellogg, ex parte*, 6 Vt. 509. *Kelly v. Paris*, 10 Vt. 261. But it was too late for the exercise of judicial power, by the magistrate, when this amendment took place. We can only regard the service as entirely void; and hence no amendment could make it good.

Judgment reversed, and judgment that the writ abate.



TOWN OF HARTFORD v. TOWN OF HARTLAND.

A settlement by seven years residence, under the statute, can only be acquired by persons above the age of legal majority. No allowance can be made for any length of residence during infancy, though it may have been after emancipation.

A removal from town, with the person's family and effects, and a residence for several months in another town, will interrupt the gaining a settlement by seven years residence, notwithstanding the person may, at the time of removal, contemplate a return at some future, but indefinite, time.

Whether a person was legally chargeable to a town, so as to entitle them to institute proceedings for his removal as a pauper, must depend upon the degree of his destitution and poverty at the time the proceedings were taken.

In this case the paupers removed were a widow, who was sickly and subject to fits, and her children, who were of tender age; and it appeared, that, previous to their removal, relief had been afforded to them by the town instituting the proceedings; and, it appearing that the widow had no property, nor interest in any property, except such as was subject to attachment, or was placed beyond her immediate control by reason of other liens, and except certain household furniture, which it did not appear was any more than sufficient to enable her to live comfortably with her children, it was held, that she must be considered as chargeable, and, as such, subject to removal.

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APPEAL from an order of removal of Sophronia Adaline Patch and her children from Hartford to Hartland, made, March 12, 1844, by two justices of the peace, under the statute. Pleas, that the paupers had not their legal settlement in Hartland, and that they were not legally chargeable to Hartford at the time of removal, and trial by jury, November Term, 1844,—HEBARD, J., presiding.

On trial it appeared that William Patch, the husband of the said Sophronia, had a derivative settlement in Hartland at the time of his death, which was August 1, 1843, unless he had acquired a settlement in Hartford by seven years' residence; in reference to which the facts appeared as follows. In November, 1826, when he was eighteen years of age, his mother, who was a widow, informed him that he must take care of himself, and that she would not call upon him for any of his earnings, nor interfere with him in any way; and thereupon he contracted to live with one Wright, in Hartford, and did live with him, until he was twenty one years of age. In the spring of 1830, soon after he became of age, he went to Whitehall to work during the season, leaving part of his clothes and effects at Hartford; and after an absence of five or six months he returned to Hartford, as he had intended, and was then married to the said Sophronia. He continued to reside in Hartford until February, or March, 1834, when he removed with his family to Lebanon, New Hampshire, for the purpose of working with his brother at making shoes and perfecting himself in the trade, leaving some of his household effects and his cow in Hartford. He soon after formed a partnership with his brother, and worked with him until April, when the partnership was dissolved, and he subsequently carried on the business alone. After the formation of the partnership he removed all his effects and his cow to Lebanon. He hired a house, and planted a garden, and planted a piece of potatoes upon shares, and continued in this way until June, 1834, when he sold his interest in his garden and potatoes and removed to Hartford; where he continued to reside until March, 1841; when he again removed to Lebanon and resided there until his death.

The testimony farther tended to show, that the father of the said Sophronia died in 1829, leaving three heirs, and that one Combs was appointed administrator upon his estate, and that there was found in his hands, upon the settlement of his administration ac-

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count in October, 1830, a balance of \$68,27, belonging to the heirs; that Combs was then appointed guardian of the minor children, of whom the said Sophronia was one; and that he had never made any settlement in the probate court, as guardian; but Combs testified, that he had no funds in his hands, as guardian, and that he had had none for some years. In the settlement of the estate of the father of said Sophronia, the reversion of the widow's dower remained unsold; and the said Sophronia's share of this was worth, at the time the order of removal was made, from \$30 to \$40;—but the plaintiffs offered to prove, that this property had been attached, in an action against said Sophronia, and that judgment was recovered in the suit against her a few days before the order of removal was made; to this evidence the defendants objected; but it was admitted by the court. It did not appear, that execution had been taken out upon that judgment. Soon after the death of her husband the said Sophronia returned to Hartford, being then possessed of a cow, three beds and bedding for the same, and some other articles of household furniture, of the value, in all, of about \$80; but the plaintiffs gave evidence tending to prove, that her mother claimed to own some part of the furniture, and that her brother had kept the cow for more than a year before the order of removal was made, for which he had not been paid, and for which he claimed a lien upon the cow. It appeared that William Patch left some wearing apparel at his decease, which became the property of the said Sophronia; but there was no testimony tending to show whether, or not, she had any of this in her possession at the time the order of removal was made. It also appeared, that the said William erected a small house in 1839, by permission of his mother in-law, upon the land which she held as her dower, which was worth, as the testimony tended to prove, from \$25,00 to \$40,00 to remove from the land; that he subsequently leased the house to one Bailey, at a rent of \$12,00 per year; that at his decease the rent for one year remained due from Bailey; and that no administration had been taken out upon his estate;—and there was no evidence tending to prove that this property had been sold, or disposed of.

The testimony on the part of the plaintiffs tended also to prove, that the said Sophronia, at the time the order of removal was made and for a considerable time previous, was in feeble health and sub-

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ject to fits; and that the town of Hartford had paid about five dollars for relief afforded her immediately before the making of the order.

The defendants requested the court to instruct the jury;—1, That if they believed there was the agreement between the said William and his mother, before he went to reside in Hartford, which the testimony tended to show, he was emancipated; and that, if he continued to reside and have his home for seven years continuously from that time in Hartford, he thereby gained a legal settlement in Hartford; 2, That the said William's absence at Whitehall, in the season of 1830, under the circumstances proved, did not interrupt the continuity of his residence in Hartford; 3, That if they believed that the said William removed his family to Lebanon in 1834 for a temporary purpose, with the intention of returning again to Hartford, and that he did return, after an absence of about three months, as the testimony tended to prove, such removal was no interruption of his residence in Hartford, to prevent his gaining a settlement there; 4, That if they believed there was property, of the kind and value such as the evidence tended to show, belonging to the estate of the said William and to the said Sophronia in her own right, the said Sophronia was not legally chargeable to the town of Hartford, so as to authorize her removal.

But the court instructed the jury, as to the defendants' first request, that, in order to gain a settlement by seven years' continuous residence, the residence must commence after the person was twenty one years of age. As to the second request the court charged as requested. As to the third request the court charged the jury, that, if the said William Patch went to Lebanon in the spring of 1834 for the purpose of making that his residence, and took his family and effects, leaving no household establishment in Hartford, and entered upon and prosecuted the business of his trade, or calling, for his own benefit, and so continued for three or four months, this would be an interruption of his residence in Hartford, although at the time of his going there he might have left a part of his effects behind, and although his object in going there was in fact to perfect himself in the shoemaking trade, as some of the testimony tended to show, and although, at the time of his removing to Lebanon, he might have intended at some future time to remove back to Hartford. As to the fourth request, the court charged the jury, that the prop-

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erty, of which William Patch died possessed, was not the property of the said Sophronia, for her to dispose of, without administration first having been taken upon the estate of the said William; that, if she was destitute and in need of assistance, the town of Hartford might furnish her support, notwithstanding there was the small house and some household furniture and a cow; that the furniture, if held in her own right, would not prevent her from becoming chargeable, if she had no more than was necessary for her family, to enable them to live comfortably; that the cow could neither be disposed of by her, nor by the town, for her support, if the testimony was believed as to the lien upon the cow for the keeping; that the reversionary interest in the dower of her mother, if worth no more than from \$30,00 to \$40,00, as the testimony tended to show, would not prevent the said Sophronia and her children from becoming chargeable to Hartford, as a lien had been created upon that interest by the attachment and judgment against her; that this lien, at the time the order of removal was made, would not be affected by the fact, that no execution had at that time issued upon the judgment; and that, if the testimony of Combs was believed, the balance found due in his hands, at the settlement of his administration account, would not prevent her from becoming chargeable to Hartford.

Verdict for plaintiffs. Exceptions by defendants.

Tracy & Converse for defendants.

O. P. Chandler and *J. Barrett* for plaintiffs.

The opinion of the court was delivered by
Royce, Ch., J. It is not necessary to state all the facts relating to the question of settlement. The settlement was indisputably in Hartland, unless William Patch, the late husband of the said Sophronia, and the father of her children, acquired a settlement in Hartford, under the eighth clause of section one of the statute of November 26, 1817, (which is re-enacted, and forms the eighth clause of section one of chap. 15 of the Revised Statutes,) by a residence there, supporting himself and family for the term of seven years.

Objections are taken to the sufficiency of the evidence given to make out such a residence, whether it is calculated from November,

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1826, when he commenced living in Hartford, or from October, 1829, when he arrived at the age of twenty one years. As to the period commencing November, 1826, it is objected, that he was at Whitehall five or six months in the season of 1830; and that at the beginning of this residence he was but eighteen years old. It is answered, that the absence at Whitehall was for a temporary purpose, that he left a portion of his effects at Hartford, intending to return there, (as he did,) when the purpose of such absence was accomplished; and as to his infancy from 1826 to 1829, it is answered, that he had previously become emancipated.

There is no occasion to determine whether the absence at Whitehall was such as would legally interrupt or sever the period of residence in Hartford; nor whether the facts disclosed in the case were sufficient to constitute a legal emancipation;—because infancy alone, during the first three years, was a bar to any accruing settlement by residence during that time. The settlement by seven years' residence is expressly confined to persons "of full age;" and these words can only have reference to the age of legal majority.

If the period is calculated from his coming of full age, it is objected, that the continuity of his residence in Hartford was broken by his removal to New-Hampshire in 1834, and his residence there for three or four months. And as it appears that he removed with his family, and set up business there, leased a house, garden, &c., and, while there, withdrew all his property and effects from Hartford, though he may have contemplated a return to Hartford at some future, but uncertain time, there was a clear interruption of his residence in that town. The case is identical, in principle, with that of *Royalton v. Bethel*, 10 Vt. 22. It follows, that the paupers had their legal settlement in Hartland, when the order of removal was made.

Whether this widow and her children were legally chargeable to Hartford must depend upon the degree of her destitution and poverty, when the proceedings were taken. It seems she was herself sickly and subject to fits, and that her children were of tender age. Little reliance for support could therefore be placed upon the personal efforts or labor of the family.

It is claimed, however, that she had property and means sufficient to have sustained herself and children, at least, for a time. She be-

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came the owner of her husband's wearing apparel upon his death in 1843; but whether any part of it remained undisposed of, when these proceedings were taken, does not appear. We are agreed, that this is entitled to no consideration. She also owned, as heir of her deceased father, an undivided share, worth from \$30 to \$40, in the reversion of her mother's dower; but this had been attached, and was then helden to satisfy a judgment against her of something over \$30. She also possessed three beds, and bedding for the same; but it appears, that one was claimed by her mother; and the jury have found, that she had no more furniture, of any kind, than was necessary to enable her, with her children, to live comfortably. And so long as it was neccessary, or expedient, that they should continue together as a family, it could answer no valuable purpose to either town, to require this furniture to be disposed of, since a like amoant would have to be substituted. It would seem, that nothing should be reckoned on account of the sum found due, in 1830, from one Combs, the administrator of her father's estate, (and of which her share was about \$20,) because that sum was then legally transferred to the custody of said Combs, as guardian of the children, and the evidence tended to show it all expended many years before the trial. She had no legal claim to the cow, or the rent due to her husband from one Bailey, (of about \$12,) until administration should be taken out upon her husband's estate; and a lien was claimed on the cow for a year's keeping. As to the small house, or cabin, erected by her husband on the dower land of her mother, (said to be worth from \$25, to \$40 to remove,) the case leaves it in doubt, whether it could lawfully be removed from the land, without consent from the tenant in dower.

The fact that these persons had been relieved, to the amount of some five dollars, at the expense of Hartford is entitled to some weight, as evidence that they were properly chargeable. No inducement appears, for affording that assistance collusively, or fraudulently. It might be otherwise, had the paupers been about to become settled in Hartford. But the only mode, in which this could happen, would be by a seven years' residence of the widow, after she became such; and her residence in that character commenced in 1843.

On the whole, we do not think there was such evidence, that she

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had the means of supporting herself and children without public aid, that the removal ought to have been defeated on that ground.

Judgment affirmed.

SOLomon Downer v. HARRISON TOPLIFF, and URIAH HAYES AND ABEL BLANCHARD, Trustees. DANIEL AIKENS, Claimant.

The indebtedness evidenced by a bond, given to indemnify an officer for having attached property of doubtful ownership, may be attached, by trustee process, as the property of the officer, after judgment has been recovered against the officer by a third person for taking the property.

A debt, which is certain as to the liability, and uncertain only as to the amount, is not contingent, within the meaning of the statute, but may be taken by trustee process.

A disclosure of one summoned as trustee cannot ordinarily be treated as evidence against another person, who is also summoned as trustee in the same suit. Disclosures of trustees are analogous, in this respect, to answers in chancery.

Where a bond, given to indemnify an officer for having attached property of doubtful ownership, was signed by one person as principal and by another as surety, and judgment had been recovered against the officer for taking the property, and the signers of the bond were summoned as trustees of the officer, in a suit against him, it was held, that notice of the assignment of the bond by the officer to a third person, given by the assignee, before the service of the trustee process, to the person who signed the bond as surety, without proof of notice to the principal in the bond, was not sufficient, to entitle the assignee to hold the amount due upon the bond, as claimant in the trustee suit.

TRUSTEE PROCESS. It appeared that Uriah Hayes, one of the trustees, in November, 1840, executed a bond to the defendant, Topliff, in the penal sum of one thousand dollars, to indemnify him for having attached, as constable, certain property in a suit in favor of Hayes against Asa Chamberlain and Carmi D. Chamberlain,

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which bond was signed by Abel Blanchard, the other trustee, as surety ; and that judgment had been recovered by one Carlos Chamberlain against Topliff in an action for taking the same property, and that a suit was now pending in the name of Topliff against the trustees, upon the bond. The claimant, Aikens, filed his declaration, alleging an assignment of the bond to himself, by Topliff, and notice thereof to the signers of the bond, prior to the commencement of this suit. No question was made as to the fact of assignment. Blanchard admitted, that notice of the assignment was given to him by Aikens prior to the service of this trustee process upon him ; and he alleged, in his disclosure, that, at Aikens' request, he gave notice to Hayes of the assignment, prior to the service of this writ. There was no other evidence of any notice to Hayes, prior to the trustee process being served upon him.

The county court, March Term, 1845,—HEBARD, J., presiding,—decided, that notice to Blanchard was sufficient, without notice to Hayes, and thereupon rendered judgment, that the claimant hold the funds in the hands of Hayes and Blanchard, and that they be discharged, with costs. Exceptions by plaintiff.

Tracy & Converse for plaintiff.

The only question before this court is in relation to the sufficiency of the notice to Hayes. That notice of the assignment was necessary is well settled. *Britton v. Langley & Tr.*, 9 Vt. 309. *Hinsdill v. Safford et al.*, 11 Vt. 309. *Kimball v. Gay & Tr.*, 16 Vt. 131. *Chase et al. v. Haughton et al.*, Ib. 595. *Giddings v. Coleman & Tr.*, 12 N. H. 163. Hayes was the principal in the bond ; and the same notice to him is necessary, as though he were the only obligor. 1 Sw. Dig. 432. *Smitie v. Runnels et al.*, 1 Vt. 148. Blanchard was in no sense his agent to receive notice. Had Hayes paid to Topliff, or his order, the amount of the bond, after notice to Blanchard and before notice to himself, it would have been a good payment.

E. Hutchinson for claimant.

The trustees were properly discharged.

1. Their contract was one of indemnity only, depending upon a contingency ; *Townsend v. Atwater*, 5 Day 298; Rev. St. 198, § 20.

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2. It had been transferred, and legal notice of the transfer given to them, before they were summoned as trustees. Their indebtedness, if any, being by a *joint obligation*, for all the purposes of the present inquiry, at least, they are to be regarded as but *one party*; and notice to either is in law notice to both. Notice to one of two or more partners, of a prior unrecorded deed, is notice to all the partners; *Barney v. Currier et al.*, 1 D. Ch. 315; *Watson v. Wells*, 5 Conn. 468. An acknowledgment by one joint debtor will take a case out of the statute of limitations as to all; *Joslyn v. Smith*, 13 Vt. 353; 1 Sw. Dig. 305; *Whitcomb v. Whiting*, Dougl. 652; *Bound et al. v. Lathrop*, 4 Conn. 336; *Coit v. Tracy*, 8 Conn. 277. Where several are bound to do an act upon notice, notice to one of them is sufficient; 1 Sw. Dig. 698; 3 Com. Dig. 121, Tit. Condition L 9. Where a condition is, to deliver possession to the lessor, or his assigns, who assigns to two, a request by one is sufficient; 3 Com. Dig. 121, Tit. Condition L 11; 1 Rol. 428, l. 10. If a promise be by three, a special request to one is sufficient; 5 Com. Dig. 366, pl. C 71. Where a previous demand is necessary to the maintenance of an action, on a joint contract, against two or more persons, a demand on one of them is sufficient; *Griswold v. Plumb et al.*, 13 Mass. 298. 1 Sw. Dig. 186. The fact, that Blanchard signed as surety for Hayes does not alter the law in that respect. As to the creditor, or any one claiming by assignment from him, both are principals.

The opinion of the court was delivered by

Royce, Ch. J. Judgment having passed in this case against Topliff, the principal defendant, the trustees disclosed; and the questions are,—1, Whether they should be adjudged liable at all, under the trustee process,—and 2, If they are liable, whether the claim against them should be adjudged to Downer, the attaching creditor, or to Aikens, the claimant. In the court below they were adjudged liable,—but liable in favor of the claimant. We think there is no sufficient ground for saying that the claim against the trustees, upon their bond to Topliff, did not constitute a kind of indebtedness, at the time when this proceeding was commenced, which might well be reached by the trustee process. The bond was

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given to Topliff, an officer, to indemnify him for having attached certain property, at the suit of the trustee Hayes, as belonging to one Chamberlin. And it is true, that, until a recovery was had against Topliff for the property, at the suit of another Chamberlin, who made good his title to it, the bond constituted but a contingent claim against the signers, and, as such, was excluded from the operation of the trustee process by express statute. But after Topliff had thus been damnedified, and a clear and substantial cause of action arose upon the bond, the signers became fixed with an obligation, which was certain as to the liability, and uncertain only as to the amount for which they might be ultimately subjected. It was like any other indebtedness, where the amount is susceptible of dispute and controversy.

Upon the other question,—It is not disputed that a legal and proper assignment of the bond, and all claims arising under it, was seasonably made by Topliff to Aikens, the claimant; so that the question depends upon the sufficiency of the notice, given of that assignment, to defeat this species of attachment.

The case finds, that Blanchard had timely and express notice. But it is not found, that Hayes had notice, prior to the service of this process upon him, unless the disclosure of Blanchard was proper evidence to prove it. The decision below, in favor of the claimant, did not proceed upon that evidence, but upon the ground, that notice to Blanchard alone was tantamount, in its effect, to notice to both the trustees. Two inquiries are consequently involved in the revision of the case here;—whether Blanchard's disclosure was legal evidence of notice to Hayes,—and, if not, whether notice to Blanchard alone was sufficient.

As a general rule, we regard the disclosure of a trustee as being analogous to an answer in chancery;—and the answer of one defendant in chancery is never evidence against a co-defendant, except in special cases, not applicable to the condition of these parties. Ordinarily, the disclosure is regarded, not so much in the character of *testimony*, as in that of admission, or denial, on the part of the trustee. It should never be treated in the former view, as against a party not entitled to be present and to interrogate the trustee;—and as a co-trustee has generally no such right, it follows, that, as against

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him, the disclosure should not be received as evidence. Blanchard might have been called and sworn as a common witness to prove notice to Hayes.

In reference to the effect of notice to Blanchard only, it may be observed, that, to many purposes, there is a marked distinction between notice by legal process, affecting the rights of individuals, and mere notice *in pais*, affecting their rights. Process must be served on every person to be directly affected by it; while a mere notice is frequently good and effectual, though given to one of several persons to be affected by it. This is on the ground of identity of interest, or that each is the agent of the others, concerning the right to be affected; as in the case of partners. But it seems, that nothing of this can justly be predicated of the relation between Hayes and Blanchard. Hayes was the principal in the bond, and Blanchard but a surety, and, moreover, insolvent. As between themselves, there was neither identity of interest, nor a mutual agency, within this principle. And as their relation to each other appeared upon the face of the bond, Aikens was bound to regard it, in giving notice of the assignment.

Judgment of the county court reversed.

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ENOCH H. WEST v. THE BANK OF RUTLAND, THE BANK OF MANCHESTER, NATHANIEL FULLERTON AND WILLIAM HENRY, and RUSSELL BURKE, Administrator of DON LOVELL.

[IN CHANCERY.]

A court of chancery will not ordinarily dismiss a suit on account of any mere informality in the position in which the parties are placed, as orators, or defendants, if all the parties interested are before the court, and a proper case is proved for the interference of the court.

An allowance of a claim by the probate court is not conclusive upon the court of chancery, upon a bill seeking relief against the claim upon grounds of mere equitable cognizance.

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If one sign, or indorse, a note, as surety for several joint principals, and one of the principals dies, the surety, having paid the debt, may claim a dividend from the estate upon the entire debt, notwithstanding he may hold collateral security for his liability. Where the security is merely collateral, a court of equity will not compel its application, merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co-surety.

APPEAL from the court of chancery. This was a creditor's bill, brought by the orator, in behalf of himself and others who might join with him, creditors of one Don Lovell, deceased, insolvent; and the orator, after setting forth his own claim, as creditor, alleged, in substance, that Lovell, in his life time, together with Samuel W. Porter and David Brown, for the benefit and at the request of the Village Falls Manufacturing Company, a corporation doing business in Springfield, signed certain notes to the bank of Rutland, and to the Bank of Manchester, and also a note to the defendants, Fullerton and Henry, and that the defendant Fullerton also, for the benefit and by the procurement of the same corporation, indorsed the notes to the banks of Rutland and Manchester, as surety, and those notes were discounted, and the money was received by the corporation; that Fullerton subsequently received from the corporation property and notes, for which he had subsequently realized the money, to an amount exceeding six thousand dollars, to be applied by him upon the notes executed to the banks of Rutland and Manchester and to Fullerton and Henry; that Lovell deceased, and administration was taken upon his estate, and the estate represented insolvent, and commissioners were appointed; that the notes to the banks of Rutland and Manchester and the note to Fullerton and Henry were presented for allowance and were allowed, in full, by the commissioners, and an order for a distribution of the assets of the estate among the creditors, and a dividend upon the full amount of those claims, was made by the probate court,—from which order an appeal was taken, which was pending at the time this suit was commenced; and that Fullerton, although applied to for that purpose, had refused to apply the funds in his hands in payment of those claims, for the purpose of diminishing the amount on which a dividend should be declared, and thereby increasing the amount of dividend ultimately to be received by the other creditors.

And the orator prayed, that Fullerton might be decreed to ren-

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der an account of all property and money received by him from the Village Falls Manufacturing Company, on account of the notes indorsed by him for that company and of the note to Fullerton and Henry, and to make application of the same upon those demands, and that the administrator be enjoined from making any payment upon the claims against the estate, until their just amount should be ascertained and determined.

The defendant Fullerton answered, admitting the execution of the notes to the banks of Manchester and Rutland by Porter, Lovell and Brown, and that he indorsed those notes, as surety, as alleged in the bill; but he denied that he had any knowledge, at the time, that the notes were executed for the benefit of the Village Falls Manufacturing Company, or that he executed the notes as co-surety with Porter, Lovell and Brown; but he alleged that Porter, Lovell and Brown were the principal stockholders in that corporation, and that he supposed they were the principals in the notes, and that he believed, at the time, that he was indorsing the notes for their benefit, and as surety for them. He also claimed, that the note to Fullerton and Henry was executed by Porter, Lovell and Brown, as principals, and that it was given for money which they received upon their own account. This defendant averred, that the amount due to him, February 3, 1840, for his liabilities above mentioned, including the amount due upon the note to Fullerton and Henry, was \$7300.00; and he admitted, that in June, 1839, he was informed, and, as he alleged, for the first time, that the notes were executed on account of the corporation, and that he then received from the corporation a large amount of funds,—but not sufficient to pay his liability,—as collateral security for the notes set forth in the bill; and he claimed, that he was under no obligation to apply those funds according to the prayer in the bill, nor to surrender them, unless the liabilities were paid, on account of which he received them. The insolvency of Lovell's estate was also admitted.

The answers of the other defendants were filed; but no material question arose in reference to them, and it is unnecessary to set them forth at length. It appeared from all the answers, that Fullerton had deposited in the banks of Rutland and Manchester an amount sufficient to pay his liability to each of those banks, on account of the notes above mentioned, but that, for the purpose, as he

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claimed, of preserving his rights, he had directed that no application should be made upon the notes of the amounts so deposited, and the notes were allowed by the commissioners on the estate of Lovell in the name of the banks.

The answers were traversed, and testimony was taken, the substance of which sufficiently appears in the opinion of the court.

The bill was dismissed by the chancellor; from which decision the orator appealed.

E. Hutchinson for orator.

The present controversy is solely between Fullerton and the other creditors of Lovell's estate; and his rights and liabilities, as the bill is drawn, are to be viewed in two aspects;—1, Treating him as co-surety with Porter, Brown and Lovell for the Village Falls Co.,—in which case he would have a claim against Lovell's estate for *contribution* only;—2, If the evidence should be thought not to sustain that aspect, treating Fullerton as surety for Porter, Brown and Lovell on those notes,—when he would have a claim against the estate for the *full amount* of his payment, after deducting what he has received upon securities furnished him upon the same matters. In the latter aspect, Fullerton admits the receipt, from those securities, of \$5160.98; and it is insisted, that this amount should be deducted from the amount allowed to the banks, against the estate of Lovell, before any dividend should be declared or paid upon those claims. The claims are a lien upon two funds,—viz. the amount already in Fullerton's hands and the estate of Lovell; whereas the orators and other creditors have for their claims only a lien upon the estate of Lovell. Equity, in such case, requires, that the creditor, having a lien upon two funds, shall first exhaust that fund upon which the other creditors have no lien, before he shall be permitted to draw from the fund upon which the other creditors have a lien,—it being inadequate. 1 Story's Eq. § 499. *Wigger v. Dorr*, 3 Sum. 414. *Aldrich v. Cooper*, 8 Ves. 388.

This bill is properly brought in the name of the orator, who sues in behalf of himself and all the other creditors of the estate, including the administrator as defendant, and charging collusion. It seeks no decree interfering with our probate system, nor with the settlement of the estate in the probate court. The bill would there-

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fore have been held good on demurrer. 1 Story's Eq. §§ 423, 581. *Morse et al. v. Slason et al.*, 13 Vt. 296. But if the bill should more properly have been brought in the name of the administrator, it is mere matter of *form*; all the necessary parties are before the court, either as plaintiffs, or defendants; there is no demurrer,—and if there had been, the bill would not have been dismissed for that cause. If there is otherwise equity in the bill, a proper decree can be made. *Cannon et al. v. Norton et al.*, 14 Vt. 183.

Tracy & Converse, L. Adams and O. P. Chandler for defendants.

1. No creditor of the estate of Lovell can in this form sustain a suit. The administrator is the only person who has authority to regulate and control the matter sought for by this bill; and if he neglects his duty he is liable on his bond. 3 Vt. 384. *Isaacs v. Clark*, 13 Vt. 657. Story's Eq. Pl. 395. If the plaintiff is not legally entitled to the relief sought, the bill will be dismissed on hearing, though a demurrer would have been allowed. Story's Eq. Pl. 352, 355.

2. But if we are wrong in this, we insist that the plaintiff cannot recover, under the circumstances of this case. Fullerton signed as surety for Porter, Brown and Lovell; and he had a right to retain all his securities until he was released from his liability. He was not obliged to apply them on the demands and take a dividend for the balance only. *Moses v. Ranlet*, 2 N. H. 488.

3. The bill cannot be sustained, as there is an adequate remedy at law. The probate court is invested with all the power necessary to carry into complete effect all the rights of the parties; and this court will not interfere with the proper and legitimate exercise of the jurisdiction of that court.

The opinion of the court was delivered by

REDFIELD, J. The subject of marshalling securities and assets is one of very frequent recurrence in courts of equity, and is sometimes attended with no inconsiderable difficulty.

In regard to the proper parties in the present suit I have not deemed it important to spend much time. All the parties interested in the subject matter being before the court, if a proper case is made

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out for the interference of a court of equity, we would not ordinarily order the suit dismissed in that court on account of any mere informality in the position, in which the parties are presented before us. Suits for a similar object to the one here sought are frequent in the English chancery. They are there brought by the creditors, or by one creditor for himself and as many others as see fit to prove their debts before the master upon the final decree, if one is obtained; and upon the bringing of such a bill the entire distribution of the assets is taken from the Bishop's court, on account of the superior facilities which courts of equity have, for making a final disposition of the matter; and it is there finally ended.

But here the principal and exclusive jurisdiction of all such matters is in the courts of probate. All proceedings, which can be entertained in a court of equity, must be in aid, merely, of the probate court. In cases like the present, where no collusion is alleged between the administrator and the creditors, or any of them, the proper orator is ordinarily the administrator himself. But when collusion is alleged and proved, we have no doubt the bill may be sustained in the name of a creditor. And if the administrator is a party to the suit, and a case is made out in proof, where, if he had brought a bill, he would be entitled to relief, and he declined to stand as orator, the chancellor should consider that, of itself, sufficient evidence of collusion and proceed to pass a decree in the name of the creditor.

We must, then, look at the merits of this case; and the first inquiry is, whether the allowance of the demands is conclusive upon this proceeding in equity. And as the claims were allowed in the names of the creditors and have never been *actually* paid to this day, we do not well see how the allowance of them could have been resisted at law. The relief sought is, it seems to us, exclusively of an equitable character; and such relief is not concluded by a judgment at law. One might have a claim against an estate, which could not be resisted at law, and upon which, nevertheless, he is not in equity entitled to a dividend.

In the present case, if the defendant Fullerton is to be esteemed a co-surety, merely, with Porter, Brown and Lovell, then it would follow, that if the allowance in the names of the creditors is really and exclusively for the benefit of Fullerton, the estate would be en-

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titled to have the funds in Fullerton's hands applied to the extinguishment of the common debt, and in that way reduce the allowance to the amount, which Lovell was bound to contribute to the final loss of Fullerton.

But such does not appear to us to be this case. The allowance may be mainly, perhaps exclusively, for the benefit of Fullerton. But we cannot view Fullerton as standing in the same position, as it regards this corporation, with those who applied to him to give his credit. Aside from the fact, that in his answer he expressly denies ever having lent his credit to the corporation, it is almost absurd to suppose that he did or would have done so. It would require very strict proof to convince me, that he did not sign solely upon the credit of the stockholders and directors; and whether he knew that it was the proper debt of the corporation, or not, is not very important; but it certainly is not satisfactorily shown, that he even knew of the existence of the company, at the time he signed.

He then had a full claim upon all the other signers for indemnity. He stood as guarantor for them and might be said to have their joint promise of indemnity. We do not know why such a joint promise should be viewed differently from any joint undertaking; and in all such cases the creditor may proceed against the estate of a joint promissor for the whole debt, or against the surviving promissors. *Deraynes v. Noble*, 2 Rus. & Mylne 495. And if he have any security, which is merely collateral to the principal undertaking, this will not prevent his proceeding for a dividend upon the whole debt.

It is true, that if the security has been converted into money, and it is between debtor and creditor, it ceases to be collateral and operates directly as payment; so that the debt is thereby reduced and the creditor can only go for the balance. And if the fund, which is collateral, is such, that the dividend will more than make up the deficiency, then, upon the payment of the whole debt, the creditor must assign. This was the only remedy at the civil law. In England and in this country, in such case, the court of chancery will often times compel the party to apply the funds in his hands and only proceed against the other funds for the balance, and, if the funds are not money, will require them to be reduced to money. But in no case, where the security is merely collateral, will a court

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of equity compel its application, merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co-surety.

This case is not, in principle, to be distinguished from that of a mortgage security merely,—which the party may hold, and still take a dividend upon his whole debt.

The decree of the chancellor is affirmed, with costs.

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FANNY PORTER AND CHARLES E. PORTER v. BANK OF RUTLAND,
NATHANIEL FULLERTON AND SAMUEL W. PORTER.

IN CHANCERY.

At law, as a general rule, a married woman can neither sue, nor be sued, unless in connection with her husband. But in chancery, whenever the interests of the two are conflicting, the wife is allowed to bring a suit against her husband, and the husband against the wife, as if they were sole and unmarried.

The husband is competent to act as trustee of his wife's separate property as well as any other person, if duly appointed; and he will sometimes be regarded as such, with a view to the protection of the wife's separate property against his creditors, without any appointment whatever.

By our law an express trust, except in lands, may be created without writing. No prescribed form of words is necessary, to create it. The intention of the party making it affords the only sure test of its creation; and, in ascertaining this intention, the language is not to be tortured by any technical constructions, but, as in the case of wills and devises, a liberal construction is to be adopted.

In designating a trustee to take charge of the fund, no greater certainty, or formality, is requisite, than in the creation of the fund itself; and, indeed, it is not necessary, in order to sustain a trust in equity, that a trustee should have been designated in the instrument creating the trust fund, or by any simultaneous or subsequent instrument.

Where it appeared, that the father of a married woman intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and he subsequently enclosed, in a letter to her husband, a

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check for \$1000, payable to his daughter, or bearer, and expressed in the letter a wish that the money might be so invested as would be for the mutual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them, and it appeared that she then had three children, the court considered the evidence sufficient to justify them in finding, that the intention of the father was, to set apart this fund for the exclusive benefit of his daughter and her children, and to place it under the control of her husband, as her trustee.

And when the wife, in such case, brought a bill to compel the appropriation to her benefit of certain bank stock, which she claimed was purchased with such trust funds, but which had always stood in the name of her husband, and the husband was made defendant in the bill, it was held, that his answer, admitting that the property was purchased by him with the trust funds, was, so far, evidence in favor of the wife against the other defendants, who had attached the property and claimed to hold it as creditors of the husband.

But the answer of the husband, in such case, is not evidence against his co-defendants, to charge them with notice of the trust.

Property, purchased by a trustee with the trust funds, and held by him in his own name, is not subject to attachment and sale by his creditors, unless they are *bona fide* creditors without notice of the trust.

Quare. Whether notice of the trust, received by the attaching creditors subsequent to the attachment, but before levy, should affect their rights acquired by the attachment, if they had no notice of the trust at the time the attachment was made.

Notice to the president of a banking corporation, that stock, standing upon the books of the bank in the name of one person, is held by him in trust for another, should be considered as notice to the corporation. And it is not necessary, in order to affect the corporation with notice of such trust, that there should have been a full communication of all the circumstances connected with it. It is enough, in such case, if the party be put upon inquiry.

Depositions of stockholders in a banking corporation are inadmissible as evidence in favor of the corporation.

Although the general rule is, that an answer, responsive to the bill, is evidence of the facts therein asserted, and cannot be overcome by the testimony of one witness, yet, when the orator seeks to charge a banking corporation with notice of a trust, and the corporation answers by one of its officers, fully denying such notice, and the orator introduces the deposition

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of another officer of the corporation, showing such notice to him, some modification of the general rule would seem to be required, inasmuch as notice given to one officer may not have been communicated to another officer, and therefore the answer and testimony would not necessarily conflict with each other.

Where it appeared, that certain stock in a banking corporation was purchased with trust funds belonging to a married woman, but stood upon the books of the bank in the name of her husband, and that the corporation, holding a promissory note against the husband, upon which a third person was liable as indorser, had commenced a suit upon the note and attached the bank stock as the property of the husband, and therefore a bill was brought by the wife, to enforce the execution of the trust, making the indorser of the note, the corporation and her husband defendants, and averring, that the indorser had paid, or deposited, the amount due upon the note, and that the corporation had commenced the suit and made the attachment upon the note by the direction and for the sole benefit of the indorser, and charging the indorser with notice of the trust, but omitting to charge the corporation with such notice, it was held, that the indorser could not thus be treated as the sole person in interest, and that, for the purposes sought by the bill, it was doubtful whether he need to have been made a defendant, and that, at all events, notice to him of the trust not having been proved, he must be dismissed, with his costs; and that, notice of the trust to the corporation not having been averred in the bill, the corporation must also be dismissed from the suit, notwithstanding the fact of such notice was denied in the answer of the corporation, as though it had been averred in the bill, and the answer was traversed, and the court, from the testimony, found that the corporation had in fact received such notice.

But it was also held, that, inasmuch as the result arrived at by the court, so far as respected the controversy between the oratrix and the corporation, was not necessarily conclusive of the rights of the former, it would be competent for the chancellor, upon such terms and conditions as he might think just and equitable, to allow an amendment to the bill, or perhaps a supplemental bill to be filed, presenting the matter of notice of the trust to the corporation.

APPEAL from the court of chancery. The bill set forth, that on the 26th day of May, 1824, Mark Richards, the father of the oratrix, Fanny Porter, made a donation of \$1000.00 to the said Fanny and her three children, and delivered the same to the defendant Samuel W. Porter, then and still the husband of said Fanny, with a writing directing him to hold the same in trust for the said Fanny and her heirs; that the said sum remained in the hands of Samuel W. Por-

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ter until January, 1825, when, by the advice and concurrence of said Fanny and said Richards, he invested \$700,00 of the money in the capital stock of the Bank of Rutland,—taking a certificate of the stock in his own name, but still holding it in trust; that the stock stood in his name until August 12, 1840, when, at the request of the said Fanny, he transferred the stock, upon the books of the said bank, to the orator Charles E. Porter, in trust for her and her children; that on the 13th day of December, 1838, Samuel W. Porter and one Lovell executed their joint note for \$3000,00, payable to the order of said Porter in ninety days, and said Porter afterwards, by his indorsement, ordered the same paid to the order of the defendant Nathaniel Fullerton, and said Fullerton, by his indorsement, duly made, transferred the same to the Bank of Rutland,—by whom the note was then discounted; that subsequently the note was paid to the bank by Fullerton, or the amount due upon it was deposited by him with the bank, for the purpose of paying or securing the same; that on the 13th day of May, 1840, a suit was commenced upon said note in the name of the Bank of Rutland, and the bank stock above mentioned was attached thereon as the property of Samuel W. Porter; that this suit was commenced by the procurement and request of said Fullerton, and the attachment was made by his direction and for his sole benefit; and that the said Fullerton well knew, at the time, that the said bank stock, so attached, was purchased by Samuel W. Porter with the trust funds of said Fanny, and that he held said bank stock in trust for her and her heirs. And the orators prayed, that the transfer of the stock to Charles E. Porter, in trust as above mentioned, be established, and that the Bank of Rutland be ordered to pay to him the dividends accruing thereon, and that Fullerton be enjoined from levying on said stock any execution which he might obtain in the action upon the note above mentioned, and that Samuel W. Porter might be called to an account for the residue of the trust fund; and there was also a prayer for general relief.

The Bank of Rutland answered, by their cashier, William Page, denying all knowledge of any donation having been made by Mark Richards of \$1000, or of any other sum, for the benefit of the said Fanny Porter, and all knowledge that the same, or any part thereof, was invested in the capital stock of the bank for the benefit of said

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Fanny, except from the orators' bill and from declarations made by Samuel W. Porter after he became indebted to the bank, and after the attachment had been made, mentioned in the bill. These defendants admitted the commencement of the suit in their name upon the note, and the attachment of the bank stock, and the transfer of the same to Charles E. Porter, as mentioned in the bill; not stating, however, that Fullerton had any connection with that suit.

The defendant Fullerton answered, denying all knowledge, that any donation had been made by Richards to Fanny Porter, or that the bank stock in question was held by Samuel W. Porter in trust for her and her heirs; this defendant admitted the commencement of the suit upon the note in the name of the Bank of Rutland, and the attachment of the bank shares thereon, and that the suit was still pending, and that he had requested it might not be discontinued and had agreed to pay the expenses of its prosecution, and that he had deposited in the bank a sum equal to the amount due upon the note, as security for the same; but he denied, that the suit was commenced at his request, or that he had knowledge of it, until after it had been commenced and after the bank stock had been attached; and he averred, that the note was not discounted for his benefit, but that he indorsed it as surety, merely.

The defendant Samuel W. Porter answered, admitting that he received of Mark Richards the sum of \$1000, in trust for his wife, Fanny Porter, and her heirs, and that the fourteen shares in the capital stock of the Bank of Rutland were purchased with a portion of that money, and that he held these shares in trust for his wife and her children, as alleged in the bill; and he averred, that he informed Fullerton and George T. Hodges, the president of the bank, before the shares were attached, that he so held them in trust. This defendant also admitted, that he had received the dividends upon those shares, but alleged that he had become insolvent, and unable to repay the same.

The answers were traversed, and testimony was taken.

Mark Richards, the father of Fanny Porter, testified, on the part of the orators, that in the year 1824 he advanced \$1000,00 to Samuel W. Porter, by way of a check on the Bank of Brattleboro'; that he had previously informed the said Fanny and her husband, that he should make such an advancement, and wished to have it invest-

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ed in some institution for the benefit of said Fanny and her children; that when he sent the check he enclosed it in a letter to Samuel W. Porter, containing this clause;—"I also enclose a check on B'o Bank for \$1000, for Fanny; perhaps it would be well to invest it where it can be secured on real estate to a larger value, so as to insure the annual payment of interest, and the principal sum, when payment becomes necessary, (or desirable.) I leave that to your and her pleasure, what mode to adopt for her and heirs mutual benefit";—and that sometime afterwards, upon inquiry made by him whether the money had been invested, Samuel W. Porter informed him, that he had invested \$700, or \$800, of the money in stock in the Bank of Rutland,—to which the witness made no objections. It appeared from the testimony of the cashier of the Bank of Brattleboro', also taken on the part of the orators, that the check, mentioned in Richard's testimony, was made payable to Fanny Porter, or bearer.

Other witnesses were examined; the substance of whose testimony is sufficiently detailed in the opinion of the court.

The court of chancery, September Adjourned Term, 1845,—HEBARD, Ch.,—dismissed the bill; from which decree the orator appealed.

E. Hutchinson for orator.

The well established rule, that, whenever trust money can be traced, a court of equity will fasten a trust upon the property purchased with the money, in favor of the persons beneficially interested, has lately received the sanction of this court. *Blaisdell v. Stevens*, 16 Vt. 187. The wife may hold real or personal property independent of her husband, without its being subject to attachment at the suit of his creditors;—and of personal property the husband may, for that purpose, be the trustee for the wife. *Pinney v. Fellows*, 15 Vt. 525. 2 Kent 162. That the bank stock in question was purchased with the money furnished by Mr. Richards is sufficiently established by the testimony, without resorting, for proof of the fact, to the answer of Samuel W. Porter. That Mr. Richards, the donor, intended the money should be kept from the immediate possession of the oratrix, in trust for the future benefit of herself and children,

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not subject to the disposal of the husband, is apparent from the testimony of Mr. Richards, and his letter accompanying the gift.

But, although the general rule is different, in this case the answer of Samuel W. Porter is evidence, as well against himself, as against the other defendants, whose only claim to the stock in question is through and under him. 1 Greenl. Ev. 217, § 178. *Osborn v. Bank of United States*, 9 Wheat. 738, [5 U. S. Cond. R. 741.] *Field v. Holland*, 6 Cranch 8, [2 U. S. Cond. R. 285.] *Vas Riensdeick v. Kane*, 1 Gal. 635. *Denton v. Perry*, 5 Vt. 382. In equity the wife may sue her husband. In the present case he was a proper and necessary party defendant. Being such, she may use his answer to the same extent, as if he were not her husband. Story's Eq. Pl. §§ 61-63. 2 Fonbl. Eq. 450, n. (c.) Ib. 456, n. (f.)

The defendants acquired no title by the attachment, the stock attached being trust property. Besides, the defendants all stand charged with notice of the trust; and whether given before or since the attachment is unimportant. Notice since the attachment is admitted; and if given either before conveyance, or before payment of purchase money, it is sufficient. Here there has not yet been either conveyance, or payment. 2 Fonbl. Eq. 148, in note. *Pinney v. Fellows*, 15 Vt. 542.

L. Adams and *O. P. Chandler* for defendants.

1. A separate personal property cannot be given to a *feme covert*, without the intervention of trustees, even if it be so expressly declared. *Harvey v. Harvey*, 1 P. Wms. 125. *Burton v. Pierpoint*, 2 P. Wms. 79. *Tyler v. Lake*, 4 Sim. 144. 1 Chit. Pr. 61. *Purdew v. Jackson*, 1 Russ. 1-72.

2. In this case it is not so declared. 1 D. Ch. 322.

3. Porter cannot be a witness for his wife; Greenl. Ev. 411; *Anstey v. Dowsing*, 2 Str. 1253; *Windham v. Chetwynd*, 1 Burr. 414; *Davis v. Dinwoody*, 4 T. R. 678; 8 Paige 47; and without his testimony, there is no evidence, that the Rutland bank stock was bought or paid for with the \$1000.

4. The testimony does not show, that a trust was intended.

5. The shares were subject to attachment. 1 Am. Chanc. Dig. 364, § 33; 522, § 15; 540, § 39; 554, § 6. 2 Story's Eq. 608-610. *Gresley's Eq. Ev. 245.*

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The case having been retained for advisement, the opinion of the court was delivered, at the March Term, 1848, by

DAVIS, J. This case involves questions of no little importance. At law, as a general rule, a married woman can neither sue nor be sued, unless in connection with her husband. Exceptions, arising chiefly from the impracticability of associating the husband in certain cases, exist in this as in most general rules. As applicable to husband and wife having adverse interests, there is no exception, unless, indeed, the proceeding seeking a dissolution of the marriage and a consequent arrangement and distribution of the property belonging to them, or one of them, be deemed such. Although she may have, before marriage, or may acquire, afterwards, separate estate, real, or personal, of which she may be despoiled by her husband, she cannot, either alone, or by the intervention of a next friend, prosecute a suit for the recovery of it. This results, not from a unity of estate, for the common law recognizes her separate property, but from a unity of persons.

Chancery, however, proceeds upon different principles; whether upon wiser principles, or not, it is too late to inquire. In that court, in suits affecting the peculiar estate of the wife, whether as plaintiff, or defendant, in respect to all the world besides her husband, there is no absolute necessity of his being made a party,—although often in practice, in conformity to the mode of proceeding at law, the husband has been associated with the wife. Recently it has been found more convenient, to say nothing of other considerations, to pretermitt the husband, in cases in which his interests are not concerned. But chancery has permitted a still farther departure from the principles of the common law. Whenever there exists an antagonism of interest between the two, it allows the wife to bring a suit against her husband, and, *e converso*, the latter against the former, as if they were sole and unmarried. It is merely necessary to introduce the slight machinery of a next friend; and in some cases the court will, by interlocutory order, compel the husband to defray the expenses of the suit on both side, while the right is in suspense.

It is not doubted, but that, in the present instance, Samuel W. Porter, the husband, was very properly made a defendant to the bill. If the fourteen shares in Rutland bank can be regarded as a trust fund, of which the oratrix is the *cestui que trust*, there was, previ-

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ous to the transfer in August, 1840, no known and recognized trustee, unless the husband can be regarded as such. He is competent to act as such, as well as any other person, if duly appointed; and even he will be sometimes regarded as such, with a view to the protection of the wife's separate property against his creditors, without any appointment whatever. 2 Kent 162-3.

As between the oratrix and her husband, however, it seems not to be regarded as a matter of any importance, what the rights of the former may be; as the latter declares himself to be insolvent, and possessed of no means of his own to pay whatever may be found due from him. The oratrix, though she has traversed the answer, offers no evidence to controvert this fact. To take an account, therefore, supposing her to be entitled to it, would be a useless proceeding, except so far as it should affect the bank shares. To this, third persons, creditors of S. W. Porter, interpose a claim; and the real controversy here is, whether they or the oratrix have the better claim in equity. In this aspect of the case, it is natural to suppose, that the sympathies of the husband are altogether with the wife; and nothing has transpired, while it has been in progress before us, to induce a different conclusion.

The bank of Rutland and Nathaniel Fullerton are the only parties, then, whose interests come in collision with those of the oratrix. They resist her pretensions mainly on two grounds;—1st, Because they say these bank shares were not trust funds in point of fact, but were truly, as confessedly they were in form, held by Porter in his own right; 2d, That if, as between them, the shares are to be regarded as trust property, yet that the trust was a secret one, not apparent in the original certificate of subscriptions or by any transfer, or other evidence, on the books of the bank, until after the attachment at the suit of the bank; and that they, the defendants, neither knew in fact, nor were so situated that the means of knowledge were within their reach, that it was trust property.

The check on the bank for \$1000, dated January 15, 1824, is in favor of "Fanny Porter, or bearer;" and the letter to Mr. Porter, enclosing it, dated May 26, 1824, says, "I enclose a check on B'o bank for \$1000 for Fanny,"—adding "perhaps it would be well to invest it where it can be secured on real estate to a larger value, so as to ensure the annual payment of interest and the principal sum

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when payment becomes necessary, or desirable. I leave that to your and her pleasure, what mode to adopt for her and heirs mutual benefit. **Mark Richards.**" These two papers, as quoted, comprise the whole of the written evidence of the original creation or declaration of a trust. There is, however, additional evidence of a parol declaration on the part of the donor, made to his daughter and her husband previous to drawing the check, which throws farther light upon his intentions. This is contained in his deposition; in which he says, that, before the delivery of the check, he had conversation with both of them, and informed them of his intention to make an advancement of that amount, and that he wished to have it invested in some institution for the benefit of his daughter and her children; that after the books were open for subscriptions for Rutland bank stock, he inquired of Porter if he had invested the money in stock of that bank, and was told he had done so, to the amount of \$700, but could not procure stock to the whole amount; and that the deponent made no objection to such investment. The defendants' counsel insist, that neither from the letter, nor the prior verbal intentions, nor from both combined, can be fairly extracted any creation of a trust in favor of the daughter, or her children, or any designation of a trustee. The plaintiffs' counsel, on the contrary, contend there is ample evidence of both.

By our law an express trust, except in lands, may be created without writing. In respect to personal property it is not a matter of any importance, whether it be by a written instrument, or by parol, or partly in one mode and partly in the other. Trusts, too, may be implied, or may result from certain facts and circumstances requiring their existence for purposes of equity. No prescribed form of words is necessary, to create an express trust. The intention of the party making it affords the only sure test of its creation. In ascertaining this intention we do not torture the language used by any technical constructions, but, as in the case of wills and devises, adopt a liberal construction, and endeavor, in the language of Judge Story, to draw *ex visceribus verborum* the true sense. 2 Story's Eq. 243-5; *Fisher v. Fields*, 10 Johns. 494; 2 Blackford 198; *Wright v. Atkyns*, 1 Turn. & Russ. 157; *Smith v. Attersoll*, 1 Russ. 266; *Taylor v. Moyrout*, 4 Dessaus. 505; 1 McCord's Ch. R. 119. *Letcher v. Letcher's Heirs*, 4 J. J. Marsh 593; *Chamber-*

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Lain v. Thompson, 10 Conn. 243; 16 Pick. 327, where the authorities from the old English Chancery Reports are collected and ably commented upon by Judge Wilde.

In designating a trustee to take charge of the fund, no greater certainty, or formality, is requisite, than in the creation of the fund itself. The same liberal constructions and the same implications exist here, as upon the other point. But chancery authorities fully warrant us in saying, that, in order to sustain and uphold a trust in equity, it is not indispensably necessary, that a trustee should have been designated in the instrument creating the trust fund, or, indeed, by any simultaneous or subsequent instrument. If no person is appointed, chancery will not suffer the beneficial objects of the trust to fail of being carried into effect for that cause, but will, on application from those in interest, provide all necessary machinery for that purpose; as in *Wallingford v. Allen*, 10 Pet. R. 583, where, on a separation between husband and wife, the former conveyed to the latter, on certain consideration, arising from a pending suit for alimony, a female slave; it was insisted by counsel, among other objections to the conveyance, that no trustee was interposed between husband and wife. The objection was overruled; WAYNE, J., argues the point at some length, and cites a number of authorities in support of the position established.

Upon full consideration of the language used by Mr. Richards, both verbal and written, in connection with the attending circumstances,—his daughter Fanny then having three children,—I cannot doubt but it was the intention of the father to set apart this fund for the exclusive benefit of Mrs. Porter and her children, or heirs, and that he intended to place it under the control of her husband, as her trustee. This intention, it is true, is not indicated with all the precision that we should look for in an instrument prepared under the eye of legal advisers. His intention cannot, nevertheless, be well mistaken. He then believed his son-in-law to be in good circumstances, and no doubt reposed full confidence in his discretion and judgment in managing the property so as to effect the object he had in view. He was willing to trust to him to select the proper mode of investing it, where it would be safe, and also yield an annual interest.

A portion, whether the \$300 remaining, or not, does not appear,

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it seems by Porter's answer was laid out in land. It would seem probable from Mr. Chase's deposition, which speaks of her owning one house in company with some other person and also the house in which the family then lived, of considerable value, that the generosity of her father was not limited to a gift of \$1000. One or both of these were purchased by her father; and although we are ignorant of the time, or times, when this was done, still, the course pursued here affords some explanation of the general views of Mr. Richards, in making advances to her. Had he merely intended to make a donation to his son-in-law, to be disposed of at his pleasure, and to go into the general mass of his property, although it would not be unnatural to expect a paternal proffer of advice as to the best mode of keeping it intact for the common benefit of the family, yet we should not expect to find directions so to dispose of it, that she and her heirs should reap the benefit of it. It seems to me, that these directions are not susceptible of any other explanation, than that he had in view a distinct appropriation of the gift for her and their exclusive benefit.

But is there any evidence, that the bank shares, attached by the defendants, were purchased and paid for out of this trust money? The only direct evidence to that effect is contained in Porter's separate answer; where the fact is directly asserted. The defendants counsel urge, that his answer cannot be used to prejudice the rights of the other defendants. The general rule is as assumed by them; but as the fact asserted is one with which they have no necessary connection, none, except that resulting from their situation as attaching creditors of Porter, and deriving all their rights to the property from and under him in that character, I am inclined to think he is a competent witness, at the call of the orator, by way of answer, to prove the general fact, that the shares were trust property, not only as it may affect himself, but as it may affect the other defendants.

There is some indirect circumstantial evidence, bearing on this point; such as the communication made to Richards by Porter, that he had invested a portion of the money in bank stock, which communication could not have been made with any reference to the defendants; the general understanding and conversation in Porter's family,—when no motive can be supposed to have existed to have

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produced a false impression,—as stated in the depositions of Jonathan Chase, Frederick A. Porter, Hannah Porter and Samuel Hemmenway; which, taken together, produces a very satisfactory conviction on the mind, that Mrs. Porter had the beneficial interest in these shares, and that he so regarded it, notwithstanding the fact, that, during all that time, they stood on the bank books in his own name.

The loan of \$300 to the last named witness, within a week after Porter received the cash on the check, and taking a note therefor payable to Mark Richards, tends strongly to show, that Porter, at the time, did not regard the money as his own. The fact, that, during the same year, he subscribed for stock and took transfers from others in his own name, which he paid for out of this money, may be regarded as having an opposite tendency. Perhaps the inconvenience of executing the necessary papers on the successive payments of assessments and of dividends in the name of his wife may afford a satisfactory explanation of this circumstance.

These shares being thus trust funds, held by Porter in his own name, but the beneficial use of which belonged to his wife, they were not subject to attachment and sale by his creditors; unless, indeed, they were *bona fide* creditors, without notice of the trust. // Were the Bank of Rutland and Nathaniel Fullerton, at the time of the attachment, in this predicament?

When I say *at the time of attachment*, I do not forget, that the plaintiffs' counsel contend, that the inquiry is not to be restricted to that point of time,—that, though they may not then have had notice, still, if subsequently, before sale on execution, notice were brought home to them, the effect would be the same. In other words, the fact of purchase is to be referred to the final sale, rather than the establishment of the lien by attachment.

Whatever plausibility there may be, at first sight, in this position, there seems to me to be strong reasons for questioning its soundness. // In a controversy between a purchaser by attachment and levy and one in any other mode, there can be no doubt, that the question of priority of right is to be determined by the time of attachment and notice, provided they are followed by the proper proceedings, after judgment, to perfect the title. Here, however, there is no such controversy. These bank shares were really held in trust at the

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time of the attachment, though the trust was not apparent ; they remained in the same condition at the time of bringing this bill, except that a conveyance had in the mean time been made by S. W. Porter, the trustee, to Charles E. Porter, expressly in trust for Fanny Porter. This was simply a proceeding in furtherance of the trust, rendered necessary, perhaps, for the purpose of bringing this suit, and at all events expedient for purposes of notice generally thereafter. Being subsequent to the attachment, it could create no new rights, militating against those thus acquired.

Supposing, then, the bank to have had no notice at the time of their attachment, but to have subsequently received ample notice, would they thereby be deprived of the right of proceeding, as if no such notice had been received ? If so, no little hardship might result, in consequence of the accumulation of costs, the omission to avail themselves of other means of satisfying their demands, relying on the security supposed to be obtained, and perhaps intervening insolvency of their debtor. This point is suggested, by way of *quære*, by BENNETT, J., in the case of *Pinney v. Fellows*, 15 Vt. 542. It was not necessary then, nor is it here, to come to any definite conclusion upon it. Individually, I incline to the opinion, that notice thus carried home to a creditor, subsequently to the attachment, would have no effect in defeating his rights under it ; yet as in the present case we have come to the conclusion, that the bank had in fact notice of the true character of these funds, at the time of their attachment, it becomes of no importance, whether this opinion be well or ill founded.

The question, then, recurs, whether the defendants, on the 13th of May, 1840, when they made their attachment, had either actual or constructive knowledge, that the shares standing in Porter's name were held in trust for Mrs. Porter.\\

The bill directly charges such knowledge in Fullerton, and represents him as the real person in interest, although the attachment was made in a suit by the bank, on a note executed by Porter, made payable to his own order, indorsed by himself and Fullerton, and discounted by the bank ; yet it is somewhat remarkable, that it nowhere charges notice to the bank, or its officers, of the character of the funds. Whether this was the result of oversight, or arose from the supposition that Fullerton had paid the note, as indorser, and

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procured the suit to be commenced in the name of the bank, but solely for his own benefit, I am unable to say. If the latter, I apprehend, however the fact might be, the orators proceeded entirely upon erroneous principles.

If a suit could be sustained at all in the name of the bank, on the ground of a legal right in the corporation, it is very clear, it must proceed and be governed by the same rules and principles, as if there were no third person, having an equitable interest in the subject matter. Notice to them was at least as necessary as to Fullerton; and perhaps more so; for it is not very apparent, that, for the purposes sought by the bill, there was any necessity of making him a defendant. He was not a party to any proceeding, which sought to appropriate these funds in payment of Porter's debts. He was a creditor, indeed, or would become so, on payment of the note, and would then, like any other creditor of his, be entitled to proceed against him for satisfaction. The injunction sought for against taking out execution and levying on the shares need not, at any rate, even if it could, have extended to any other person than the plaintiffs in the suit.

But the bank, by their cashier, William Page, as if regularly called upon by the bill, answer distinctly, that they had no knowledge of the gift, by Richards to Fanny Porter, of \$1000, or any sum, or of the investment thereof in the stock of the bank, previous to the attachment, and none since, except from the orators' bill and the declarations at different times of S. W. Porter. If it was necessary for the corporation at all to answer upon this point, it cannot be questioned, but that the answer must be received as evidence. It is responsive to the bill, assuming the bill to have averred notice. Conclusive, of course, it is not. The only evidence there is to contradict this answer, aside of S. W. Porter's answer, of which I will speak presently, is contained in the deposition of George T. Hodges; who states that Porter, about the time Morris & Nesmith failed, in a conversation in which he proposed to sell the stock standing in his name, remarked, that it belonged to his wife. He adds, that, at the time, he was president of the bank. We have no means of ascertaining when this was, except by referring to the answer of Porter, in which he says Morris & Nesmith failed May 17, 1839. This was before the attachment. Luther Daniels' deposition tends also

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to establish the date of the conversation, alluded to by Mr. Hodges, as being before the attachment. He was an incompetent witness for the bank, being a director and stockholder; but his testimony was adverse to the party that called him, and therefore admissible on that point. Supposing it to be allowable, as I think it is, to ascertain a date, thus incidentally mentioned, by one defendant, whose statements are not in all points to be received against the others, there is, then, the testimony of one witness in opposition to the answer.

Doubts were suggested in argument, whether notice to the president should be considered as notice to the corporation. I have no doubt it should be. There is no other officer, or agent, to whom it could have been made with more propriety. It would be equally available, no doubt, if made to the cashier, or a director. Nor am I disposed to detract any thing from the weight of this evidence, because there was not a full communication of all the circumstances connected with her ownership. The fact being communicated, and being true, would be sufficient. It is never required, in questions of this kind, that full and accurate details should be given, in order to constitute notice. It is enough, if the party be put upon inquiry,—apprised of the fact in general terms; and he will omit, at his peril, to seek for full information in those places, and of those persons, where it may reasonably be expected to be found. *Blaisdell v. Stevens et al.*, 16 Vt. 179. Sugd. on Vend. 532. 4 Johns. Ch. R. 39-44. *Anderson v. Van Alen*, 12 Johns. 348.

Porter, in his answer, states, that he gave repeated notice to Fullerton, before the attachment, of the character of the funds, and also, that he gave a similar notice to Mr. Hodges, the president, before June 25, 1839; but I lay this testimony out of the case,—being fully satisfied, that, on a question of this kind, his statements, by way of answer, cannot be received to prejudice either the bank, or Fullerton.

This state of the evidence would seem to leave the point in issue, if it could be regarded as in issue, in no little doubt and uncertainty. Upon ordinary principles, something more than the testimony of one witness must be adduced, to overthrow an answer in a point directly responsive. Nothing more than that exists in the present case. I lay out of the case the deposition of Mr. Page, as I have done

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that of Porter, so far as the Rutland bank is concerned, because, being a stockholder, he is incompetent as a witness for them. As respects Mr. Fullerton, there is no impediment to his testimony.

Perhaps the circumstance, that the answer of the bank is put in by its cashier, as it must necessarily be by some officer, or agent, who swears to matters appearing, or not appearing, upon the bank books and papers, and to such as are within his personal knowledge, but who would not necessarily be cognizant of verbal communications, made to another officer, might require some modification of the principle above alluded to, concerning the weight of evidence. It seems to me, that it should; for the answer put in by the cashier is not necessarily in conflict with the testimony of Mr. Hodges. It is only necessary to suppose, that the latter had not informed the former of the verbal communication made to him, to see that there is no antagonism between the two. These considerations, on the whole, incline us to come to the conclusion, that the bank had such notice, as would forbid their attaching the shares as the property of Porter.

But, as already stated, I am unable to surmount the difficulty, that the bill contains no allegation of notice, as respects the bank; and though the answer volunteers to say there was none, which answer is traversed by the orators, yet it would require us to overleap principles of chancery practice everywhere recognized, and in their nature most safe and salutary, to regard these circumstances as forming an issue upon that essential point.

As respects Fullerton the case is far less complicated. Notice to him is distinctly charged in the bill, and he as distinctly denies it in his answer. The orators have no admissible evidence to overcome the answer. Porter's answer, as already shown, cannot be received as competent for that purpose. If it should be contended, that, owing to his liability on the note, the deposit of money sufficient to discharge his liability, and the fact, if it be a fact, that he requested the suit to be brought and the shares attached, he is to be affected with notice given to the bank, as his agent, yet the orators could not prevail; because the testimony of Mr. Page, which was inadmissible in favor of the bank, encounters no objection, when brought to bear in favor of Mr. Fullerton. His evidence comes strongly in aid of the answer. Allowing the testimony of Mr. Hod-

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ges to come in aid of the bill, in this aspect, there can be no room for doubt, as to which way the evidence preponderates.

The result is, as to Nathaniel Fullerton, the orator's bill must be dismissed, with costs, including the costs of this court; and, if the orators consent to that course, the bill will also be dismissed, without costs, as to Samuel W. Porter.

As it will be perceived, that the result arrived at, so far as respects the controversy between the orators and the Rutland bank, is not necessarily conclusive of the rights of the former, it will be competent for the chancellor to allow an amendment to the bill, or perhaps a supplemental bill to be filed, presenting the matter of notice, on such terms and conditions as he may think just and equitable.

As respects the Rutland bank, the decree of the chancellor is reversed *pro forma*, and the case is remanded to the chancellor for further proceedings.



BENJAMIN SMITH, JR., v. ALBERT ONION and JAMES LOVELL.

IN CHANCERY.

This court do not regard an absolute conveyance of property, with a secret clause of defeasance, written or verbal, as a conclusive badge of fraud; but such conveyance is open to suspicion.

Where a creditor, who has levied his execution upon land thus conveyed, brings a bill to set aside the conveyance as fraudulent, and, upon the coming in of the answers, it appears that the conveyance was in fact intended as a security, and that a bond of defeasance was given back, the regular course is, for the orator to amend his bill, by inserting a prayer, that the conveyance may be treated as a mortgage and he be allowed to redeem.

Where a debtor conveyed, to one who had formerly been his partner, for the purpose of securing to him such partnership balance as might ultimately appear to be due to him, real and personal property to a large amount, by conveyance absolute upon its face, but taking back a deed of defeasance, and the person to whom the conveyance was thus made refused to disclose to

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the orator, who was an execution creditor of the one who made the conveyance, the amount of his lien upon the property, and it appeared, that the amount of that lien was not in fact ascertained at the time the conveyance was made, although that might probably have been done with considerable accuracy, and the orator had levied his execution upon a portion of the real estate thus conveyed, treating it as the property of the debtor in fee, and then brought this bill, to have the conveyance set aside, or to be allowed to redeem, and it now appeared, that the amount of property conveyed was more than sufficient to pay all the liabilities of the debtor to his partner, even after taking out the estate levied upon by the orator, it was decreed, that the defendants might, at their election, convey to the orator, by suitable deeds, the land levied upon by him, or pay to him the amount due upon his execution, and receive a conveyance from him; and that, in either event, cost should be taxed against the defendants.

APPEAL from the court of chancery. The substance of the bill and answer and the facts found are sufficiently detailed in the opinion of the court. The court of chancery, July Adjourned Term, 1845,—HEBARD, Ch.,—dismissed the bill. Appeal by orator.

O. P. Chandler and *L. Adams*, for orator, cited 2 N. H. 148, 389; *Cadogan v. Kennett*, Cowp. 432; 5 S. & R. 278; 3 Vt. 565; 4 Vt. 405; 12 Vt. 199, 699; *Barrett v. Sargeant et al.*, 18 Vt. 365; 14 Vt. 518; 1 Chit. Pract. 438, 498, 561; 15 Vt. 185.

Tracy & Converse, for defendants, cited Story's Eq. Pl. 24, 27, 28, 212; *White v. Yaw et al.*, 7 Vt. 357; *Colton v. Ross*, 2 Paige 396; *Thomas v. Warner*, 15 Vt. 110; *Lloyd v. Brewster*, 4 Paige 537.

The opinion of the court was delivered by

DAVIS, J. It appears, that, January 20, 1840, the defendant Onion made two deeds to Lovell of certain real estate in Chester and in Weathersfield, for the consideration stated of eighteen hundred dollars. They were quitclaim deeds, and were duly acknowledged and recorded. At the same time a defeasance was executed by Lovell, binding him to reconvey the premises to Onion on the latter paying his share of certain debts and liabilities growing out of the purchase, manufacture and sale of woolen goods, in which they had been jointly concerned. This defeasance was not registered. At the same time Onion executed a bill of sale to Lovell of a considerable quantity

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of personal property, valued in the bill at about \$450. This sale is absolute on the face of it. The orator's bill charges, that these conveyances were voluntary, without consideration paid, and void, as against existing creditors. There is a receipt given by Lovell for this personal property, and a promise to apply the avails of it in payment and discharge of the same debts and liabilities mentioned in the defeasance above referred to. The bill farther charges, that Onion was greatly indebted to divers persons, and, among the rest, to the orator in a large sum, which was ultimately reduced to judgment.

The defendants answered jointly, that the conveyances of real and personal estate were made solely to secure Lovell for his liabilities growing out of their partnership transactions as aforesaid; and they state, that the amount due from Onion, for his share, was about one thousand dollars. It is also stated in the answer, that Lovell had signed a note with Onion, as surety, on which about \$180 was due; and it is stated, that this was comprehended in the security to be provided for. But this, so far, appears to be a mistake; as nothing is mentioned in the bond of defeasance, save the partnership matters.

Considerable testimony was taken on both sides, chiefly bearing upon the question of the *bona fide*, or fraudulent, character of the conveyances. It is unnecessary to detail it at length.

This court do not regard an absolute conveyance, with a secret clause of defeasance, written, or verbal, as a conclusive badge of fraud. Perhaps, when we take into account the many embarrassments in which other creditors are placed in reaching the property of their debtors, thus circumstanced, it would have been better to have adopted the same doctrine understood to prevail in New Hampshire, and perhaps in other states, and pronounce all such conveyances *ipso facto* void, as against creditors. As it is, this court has often declared such conveyances open to suspicion, in the inquiry before the jury whether fraudulent, or not, in fact.

In the present case there are several circumstances, besides the character of the conveyance, which expose it to suspicion. There are others, connected with the time and manner of the conveyance, calculated to mitigate our judgment. Upon the whole we have

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come to the conclusion not to pronounce these conveyances absolutely void for fraud.

That it is to be regarded as virtually a mortgage, and of course open to redemption by the orator, in consequence of his levy on a part of the premises, is not disputed by the defendants. They however insist, that the orator's bill is not adapted to this aspect of the case. Although it might doubtless have been more distinctly framed to present the matter as a mortgage, yet it must be borne in mind, that it would be inconsistent with the main view taken, and that the orator had no access, until after answer filed, to the bond for reconveyance, and could not therefore insist on it in his original bill. It might have been, after answer, presented in an alternative form by an amendment; and such course would have been more regular.

There was, it seems, an amendment to the prayer of the bill, looking to a possibility that the conveyance might be regarded as a mortgage.

We see no difficulty in advising such a decree, as will subserve the purposes of justice between these parties. We allow to the orator the right of redemption, and, as the value of the real and personal estate conveyed by Lovell to Onion, according to the valuation of the parties, was double the amount for which the former had a right to claim indemnity, it was therefore inequitable and improper to attempt to lock up from the reach of other creditors such an amount, if not fraudulent.

It is no satisfactory answer to say, as was probably true, that the amount of liabilities was unknown. It was susceptible of ascertainment, and should have been ascertained with at least an approach to accuracy, before such a sweeping appropriation was resorted to. Or if that were impracticable, the conveyances should and could have been made expressly as a security for whatever balance might be found due on settlement, assuming the amount to be unascertained.

The conduct of Lovell, when requested by the orator, about the time he obtained judgment, to disclose the true character of the transaction, and, if in trust, to state the amount of his claims upon it, was wholly inequitable. His referring the orator to Onion for information, which he, as well as Onion, had the means of impart-

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ing, was properly regarded as a mere evasion. Indeed, he plainly intimated, that he would impart the desired information when compelled to. The orator was then under the necessity of abandoning his lien upon the land, acquired by the attachment, or taking the course he did; which was, to levy on enough of the land to satisfy the execution, treating the conveyance as fraudulent and Onion as the owner of the fee, as to creditors, instead of an equity of redemption merely.

Under the circumstances, we are of opinion that the remaining property, even deducting the amount of personal property, which was taken and sold on execution by the orator, is amply sufficient to satisfy all the just claims of Lovell;—but whether so, or not, we reverse the decree of the chancellor, and remand the case, with directions to enter a decree that the defendants pay the full balance of the orator's execution against Onion and others, as it stood at the time of the levy, and the legal interest thereon, at such time as the chancellor may order, or quitclaim, by proper deeds of conveyance, to the orator, all right, title and interest they, or either of them, have to the premises in Chester, levied upon by the orator, at the option of the defendants; and we recommend that, costs be taxed against both defendants in this court and in the court of chancery; and farther, that, in case the defendants shall elect to pay the amount of the orator's execution, and shall pay to the clerk for the use of the orator the same, together with costs, at such time as may be ordered by the chancellor, then the orator, on demand, shall relinquish all right and title he may have acquired in the premises by virtue of his levy.

**IRA DAVIS v. MARY PARTRIDGE, Administratrix.**

Where exceptions are taken by one party to the decision of the county court in accepting a report of auditors, judgment will be affirmed, unless it appear that it should be reversed upon those exceptions; but if reversed, the whole case will be before the court, to render such judgment therein as the county court should have rendered; the other party may therefore, upon the hearing, argue, if he choose, such questions as were decided against him by the county court, although he took no exceptions at the time.

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In this case a report had been made by auditors, and exceptions had been taken by one party to decisions made by the county court in accepting the report, and now, upon the argument of the case, a question was raised, whether the whole case was open, so that the other party might take advantage of questions decided against him by the county court, and upon which no exceptions were reserved.

BY THE COURT. Such questions cannot be considered, in the first instance, as open. But in the event of our reversing the decision of the county court, as this is a report of auditors, the whole case will be before the court, to render such a judgment as the county court should have rendered; so that the party not excepting is entitled to argue provisionally, if he chooses, the points decided against him in the court below. But if the defendant fail to satisfy us, upon her exceptions, that she is entitled to have judgment reversed, it will of course be affirmed. The plaintiff, of course, is not in the first instance entitled to have the judgment reversed upon the ground of decisions, to which he took no exceptions.

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BENJAMIN SMITH v. ONION & LOVELL

[Same Case, ante, page 487.]

In a case appealed to this court from the court of chancery a motion to suppress testimony will not be heard as a preliminary question,—but only upon the general hearing of the case.

Testimony will not be suppressed, merely for the reason that it was taken by one who is master in chancery in an adjoining county. The power of the court of chancery to appoint such a person a special examiner cannot be doubted; and the appointment of a special examiner need not appear upon the papers in the case.

APPEAL from the court of chancery. Before the reading of the testimony in the case was commenced, in this court, a motion was called up, which had been filed in the court of chancery and overruled there, to suppress the testimony in the case, on the ground of want of authority in the examiner to take testimony in this county, he being a master in chancery in an adjoining county.

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BY THE COURT. Such questions are not heard in this court as preliminary questions; but only at the general hearing of the case. And so far as the authority of this examiner depended upon the right of the court to appoint him,—which could hardly be questioned,—we ought, perhaps, to consider it as confirmed by the court of chancery, in overruling the motion to suppress upon that ground. We are not aware, that the appointment of a special master, or examiner, to take testimony in a case must necessarily appear in the papers of the case. The chancellor may make the appointment by a commission under his own hand, which the examiner may retain in the same manner a general master retains his commission,—never sending it up with testimony which he takes.



DEARBORN H. HILTON AND SAMUEL WALKER v. NATHANIEL FULLERTON.

IN CHANCERY.

In this case THE COURT held that the appellant, in a case coming to this court from the court of chancery, must furnish the copies; but that the copies, required by the rules of the court of chancery to be furnished in that court, belonged to the case and should come up with it.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORANGE.

MARCH TERM, 1847.

PRESIDENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. DANIEL KELLOGG,
HON. HILAND HALL, } ASSISTANT JUDGES.
HON. CHARLES DAVIS.

JOHN H. WOODWARD v. HENRY FRANCIS.

In an action of account between partners, in which the plaintiff claims that the defendant account for money received by him from the avails of the business during the partnership, an agreement, executed by the plaintiff and delivered to the defendant, previous to the commencement of the action, in which it is recited, that the defendant has relinquished to the plaintiff all claim to the demands due to the firm and to the stock of the firm, in consideration of which the plaintiff promises to pay the debts due from the firm and to indemnify the defendant against them, has no legal tendency to sustain a plea by the defendant, that he has fully accounted for the money claimed in the declaration.

ACCOUNT. It was alleged in the declaration, that the plaintiff and defendant had been partners in business, and that the defendant had received more than his just share of the money arising from the profits of the business; for which an account was demanded. The

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defendant pleaded three pleas in bar, the substance of each of which was, that he had fully accounted with the plaintiff of and concerning the money mentioned in the declaration; and upon these pleas issue was joined. Trial by jury, June Term, 1845,—HEBARD, J., presiding.

On trial the defendant offered in evidence an agreement purporting to be signed by the plaintiff, in which, after reciting that the defendant had relinquished to the plaintiff all claim to the demands due to the firm, except an account against one Shepley, and also all claim to the stock of the company, the plaintiff promised, that he would pay all debts due from the firm, and would indemnify the defendant against them;—to the admission of which the plaintiff objected; but, its execution by the plaintiff having been proved, it was admitted by the court. Testimony was also given upon the question as to the delivery of this instrument.

The court instructed the jury, that the legal effect of the writing was to prove the allegations in the defendant's pleas, and that, if they found the writing was delivered, they should return a verdict for the defendant.

Verdict for defendant. Exceptions by plaintiff.

Hunton for plaintiff.

Walker & Slade for defendant.

The opinion of the court was delivered by

KELLOGG, J. A reference to the case shows, that the question raised for the consideration of this court is, whether the writing, referred to in the bill of exceptions, tended to sustain the defendant's pleas, or either of them. If such were not the legal tendency of the instrument, then manifestly the charge of the court below was erroneous.

The writing contains an acknowledgment of the plaintiff, that the defendant had relinquished to him all the defendant's claim to all of the accounts of Woodward and Francis, except an account against one Shepley, which was to be the defendant's; also a relinquishment to the plaintiff of all the stock of the company. It also contained a promise of the plaintiff to pay the demands due and owing from the

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firm of *Woodward & Francis*, to any person, and an indemnity to Francis against all claims due from the company. But the writing does not purport to show any accounting by the defendant with the plaintiff, for the *money* which the defendant received from the profits and business of the company during the copartnership. It does not show that the parties went into any examination of the accounts *as between themselves*; nor does it contain any release to the defendant, to exonerate him from accounting for the *money* which came to his hands.

It has been urged in the argument, that the release by Francis of all his claim to the *stock* of the company, should be construed to mean all the *effects* of the company including money, as well as the materials and manufactured articles belonging to the company; and that, if there is any liability on the defendant to account for monies he has received over and above his share of the profits, it is a liability to the company; and that, as the plaintiff undertook to indemnify the defendant against the claims of all persons *upon the company*, therefore the writing tended to prove an accounting for the *money* which the defendant had received. We do not perceive the application of this reasoning to the case at bar, and cannot therefore yield our assent to the conclusion, at which the counsel for the defendant arrives in the argument. This is not a *claim in favor of an individual upon the copartnership*, but a *liability* of the defendant to his co-partner for money received by the defendant above his share of the profits. The declaration alleges, that the defendant had received the money. The pleas aver, that the defendant had accounted for the money thus received; and the defendant relies upon the writing, as containing the evidence of his so accounting. Now we cannot discover, that the writing has any tendency to show any accounting for the *money* received by the defendant, and consequently are of opinion, that the county court erred in their instructions to the jury.

The judgment of the county court is reversed, and the cause remanded for a farther trial.

Hutchinson v. Hutchinson.

HARVEY HUTCHINSON v. AMOS HUTCHINSON.

A guardian, who contracts with another person to support his ward, and does not attempt to limit the right of such person to the estate of the ward for indemnity, is himself personally liable upon such contract.

In this case the defendant, who was guardian of a person *non compos mentis*, contracted with the plaintiff to board the ward at \$1,50 per week; but no time was fixed for the duration of the contract; at the end of a year the plaintiff informed the defendant, that he would not board the ward longer for less than \$2,00 per week, and that he must take the ward away; the defendant attempted to remove the ward, but he was unwilling to leave; but the plaintiff still insisted that the defendant should remove the ward, unless he would pay \$2,00 per week for his board; the defendant made no direct promise to allow more than \$1,50 per week, but neglected to take the ward away; and it was held, that it must be taken that the defendant acquiesced in the additional price claimed by the plaintiff, and that he was liable therefor.

But, it appearing that the plaintiff had never given notice to the defendant, that he should charge more than \$2,00 per week for keeping the ward, it was held, that he was not entitled to charge the defendant for extra services about the ward, such as repairing bedding and clothing, extra washing, care when sick, and the trouble and expense of his burial.

BOOK ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows.

The items of the plaintiff's account, in reference to which controversy was had in the supreme court, were for boarding one Frederick White from March 26, 1836, to May 7, 1837, at \$1,50 per week, and from May 7, 1837, to the time of his death, which was March 18, 1842, at \$2,00 per week, and for extra services in taking care of said White,—such as repairing bedding and clothing, extra washing, care when sick, and the trouble and expense of his burial.

It appeared, that the defendant was appointed guardian of White in 1823, and that he continued such guardianship until the death of White. In March, 1826, the defendant agreed with the plaintiff to keep White for \$1,50 per week. No time was agreed upon, and nothing was said between them how or when the plaintiff should be

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paid, nor as to the capacity in which the defendant was acting, nor whether the defendant should be personally liable to the plaintiff for the keeping of White, nor whether the plaintiff should look to White, or the property of White in the hands of his guardian, for his pay. White had property, which was then known to the plaintiff; and the plaintiff also knew, that the defendant then was and for some years had been guardian of White. Immediately after this contract was made the plaintiff took White and kept him the length of time and rendered the services charged for in his account. About the seventh day of May, 1837, the plaintiff gave the defendant notice, that he must take away White, as it was inconvenient to keep him longer, and that he would not keep him longer for less than two dollars per week. The defendant went to the plaintiff's house for the purpose of removing White; but White was unwilling to go, and the defendant left without him; but the plaintiff, upon meeting the defendant, again told him, that he must take White away, that he did not wish to keep him any longer, and that he would not keep him longer for less than two dollars per week. No express promise was ever made by the defendant, to give the plaintiff more than \$1,50 per week for keeping White; but he neglected to take White away, or to provide any other place for him. The plaintiff never gave the defendant notice, that he should charge more than two dollars per week for keeping White.

After the death of White the defendant requested the plaintiff to present his claim for allowance for keeping White to the commissioners on White's estate. The plaintiff at that time insisted, that his claim for keeping White was against the defendant, and not against White's estate; and, owing to a dispute between them about the contract, the plaintiff refused to present any claim to the commissioners. The defendant, after this refusal, presented a claim to the commissioners for the keeping of White by the plaintiff, at \$1,50 per week for the whole time the plaintiff kept him; and that sum was allowed by the commissioners to the defendant. Upon settling White's estate there appeared to be property sufficient to pay all the debts, as allowed by the commissioners, and the expenses of administration, except about nine dollars.

Upon these facts the county court, December Term, 1846,—REDFIELD, J., presiding,—allowed these items in the plaintiff's account, as charged. Exceptions by defendant.

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J. S. Marcy and L. B. Peck for defendant.

1. A guardian is the mere agent of his ward, having an authority not coupled with an interest. 2 U. S. Dig. 150. 13 Pick. 206. When a person is known to act as agent, and his principal is known, the agent is not personally responsible. Ham. on Ag. 324. 8 Pick. 56. *Cheney v. Clark*, 3 Vt. 491. *Abbott v. Cobb*, 17 Vt. 593. It is believed, that, where one is legally an agent, which *ex vi termini* includes authority, he cannot be personally bound by any thing short of an express engagement to that effect, or some manifestation, or intimation, from which the other party might infer an intention to become personally responsible; certainly not, at least, without the practice of some artifice, calculated to lead the other party to believe such was the intention. In this case the defendant had been for many years guardian of White; and this was known to the plaintiff. White had, at the time of the contract, ample property, which was chargeable for his support, and which rendered any further security unnecessary; and not only was the contract for White's sole benefit, but his *personal support* was the *subject matter* of it. And under such circumstances it is unnatural to suppose that the responsibility of the defendant was expected or intended to be incurred. A guardian is not liable, except upon his express contract. *Tucker v. McRee*, 1 Bayl. 344. *Penfield v. Savage*, 2 Conn. 386. 2 U. S. Dig. 482, *pl. 124*; 483, *pl. 154*.

2. The plaintiff cannot recover more than the price agreed upon; the subsequent acts of the plaintiff did not rescind, or alter, the original bargain. *Aldrich v. Londonderry*, 5 Vt. 441.

3. The plaintiff never gave any notice, that he should charge for the extra expenses, or services, included in his account; and the defendant had a right to expect, that the price per week was to pay for all that White had. 2 U. S. Dig. 482, *pl. 124*; 483, *pl. 153, 154*. 13 Pick. 406.

Hebard & Steele for plaintiff.

1. The plaintiff insists, as matter of *law*, that the defendant made himself liable for the amount of the services rendered. He did not attempt to excuse himself from the fulfilment of the contract, when making it. He could, by his contract, bind none but himself; *Thacher v. Dinsmore*, 5 Mass. 299. The credit is always given to

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the guardian personally; he knows whether he has the means for paying the debts, which he contracts; and others have no means of knowing. The fact, that the plaintiff knew that the defendant was guardian, could make no difference; a guardian stands *in loco parentis*, and contracts for his ward as a parent does for his child; and each is equally holden for his contract; *Forster v. Fuller*, 6 Mass. 58; *Collard v. Crane*, Brayt. 18; *Thompson v. Boardman et al.*, 1 Vt. 367; *Lovell v. Field et al.*, 5 Vt. 218; *Wheelock v. Wheelock*, 5 Vt. 423. The guardian has an *interest* in his ward's estate and not a mere *authority*, or office; he has such an *authority*, coupled with an *interest*, as enables him to recover his ward's estate by suit; *Thompson v. Boardman*, *ub. sup.*; *Byrne v. Van Hoesen*, 5 Johns. 67; *King v. Inh. of Oakley*, 10 East 491. Guardians and administrators are liable personally for costs.

2. The defendant made himself liable, as matter of *fact*, by the manner in which he contracted with the plaintiff.

3. The defendant was liable to pay the advanced price, claimed by the plaintiff, upon an implied promise to that effect. When the plaintiff told him, that he would not keep White any longer for less than \$2,00 per week, and the defendant suffered White to remain there, the law will imply a promise to pay that sum.

4. The objection to the allowance of the items for extra expenses and services is a question of fact, and cannot be examined by this court.

The opinion of the court was delivered by

HALL, J. It is objected in the first place, in behalf of the defendant, that, in making the contract for the keeping of the ward, he is to be considered as having acted in the character of an agent of the ward, and not to have bound himself personally, but only the estate of the ward,—it appearing that the plaintiff had full knowledge that he was guardian.

It is not found by the auditor, that, at the time of the making of the contract for the board of the ward, the defendant undertook to limit the right of the plaintiff to the estate of the ward, for his indemnity; and I have not been able to entertain any doubt, that the liability of the guardian, under such circumstances, is personal. The guardian has the possession and control of the estate of the

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ward, for the purposes of his support and maintenance, and has the power of indemnifying himself out of such estate for any proper contracts he may make. It is his business to know the amount and situation of the estate; and he is not obliged to incur any liability beyond it. If he do so, it is his own fault, for which others, who cannot be supposed to be so well possessed of this knowledge, ought not to suffer. We therefore think the defendant is personally liable and the action properly brought.

Upon the other principal question in the case,—whether the plaintiff can be allowed more than \$1,50 per week, for the keeping of the ward,—we have not been without considerable doubt. The defendant never made any direct promise to give the plaintiff over \$1,50 per week, but neglected to take the ward away, and suffered him to remain with the plaintiff until the time of his death, although notified, at the end of a year, that the plaintiff would not keep him longer for less than \$2,00 per week. On the whole, considering that the defendant was entitled to the legal custody of the ward, and that it was his duty to provide a place for his support, and considering that the plaintiff, notwithstanding the refusal of the ward to leave his house, insisted upon the defendant's taking him away, unless he would pay the \$2,00 per week, and especially considering, that the defendant gave no notice to the plaintiff to return the ward to the defendant's custody, and made no claim, that it was not his own duty to go after him, we are of opinion, that the defendant is to be treated as having acquiesced in the claim of the plaintiff for the additional price, and consequently, that the judgment of the county court is right, in allowing the \$2,00 per week found by the auditor.

The report farther finds, that the plaintiff never gave the defendant notice, that he should charge more than \$2,00 per week for keeping the ward; and we think no contract of the defendant is shown, for the payment of the several charges for extra services in his keeping, which were disputed before the auditor, but included in the judgment of the county court. The judgment of the county court is therefore reversed, and judgment is to be rendered for the plaintiff for the sum found by the auditor, lessened by the amount of those charges.

McCrillis v. Banks et ux.

EVANS MCCRILLIS v. JOSEPH BANKS, and PAMELIA BANKS, his wife.

One of two tenants in common of personal property cannot recover against the other, in an action on book account, for having used more than his share of the common property.

If the defendant have been guilty of a tort, in having used, without the plaintiff's permission, personal property belonging to the plaintiff, for which the plaintiff might recover in an action of trover, the plaintiff cannot charge and recover for such property on book account.

If the defendant prevail upon his exceptions, and judgment is rendered in favor of the plaintiff for a reduced sum, the defendant's costs in the supreme court are to be set off against the judgment in favor of the plaintiff and execution to issue for the balance only.

BOOK ACCOUNT. Judgment to account was rendered, and an auditor was appointed. The item in the plaintiff's account, in reference to which controversy was had in the supreme court, was for a quantity of hay. It appeared, from the auditor's report, that in 1838 the plaintiff and the defendant Pamelia Banks, then sole and unmarried, were tenants in common of certain premises, upon which a quantity of hay was cut. The hay was put into the barn upon the premises, then occupied by the said Pamelia; and in the ensuing winter she used, for the stock which she kept in the barn, five tons more than her half of the hay;—for which the plaintiff claimed to recover in this action. The hay was used with the knowledge of the plaintiff; but it did not appear, that he ever gave the said Pamelia permission to use it, or that she ever promised to pay for the same. The auditor reported, that, if the plaintiff was not entitled to recover for the hay, there was due to him a balance of \$3,81; but that, if he was entitled to recover for the hay, there was due to him a balance of \$23,81.

The county court, June Term, 1845,—HEBARD, J., presiding,—rendered judgment for the plaintiff, upon the report, for \$23,81, damages, and his cost. Exceptions by defendants.

J. W. D. Parker for defendants.

The case finds, in the defendant, a wrongful assumption of the plaintiff's property; that, in regard to the five tons of hay, the un-

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doubted ownership of which was in the plaintiff, the defendant was a tort-feasor. The plaintiff has mistaken his remedy.

1. If there were no tenancy in common in the case, the plaintiff could not recover in this action on book account. Trespass, or trover, would be the appropriate remedy. *Peach v. Mills*, 14 Vt. 371. One of two joint owners of personal property, who puts the property to his own use, or sells it, is not on that account liable to be sued by the other in the action on book account. *Albee v. Fairbanks*, 10 Vt. 314.

2. But, if the parties were tenants in common, the only appropriate remedy of the plaintiff is an action of account. In all cases, where there is a destruction of the property in common by one of the tenants, the other may maintain trover; but, where there is a mere user of more than his share, account alone will lie. Rev. St. 219, § 1. 1 Sw. Dig. 170, 581. *Albee v. Fairbanks*, 10 Vt. 314. *Mattocks v. Lyman*, 16 Vt. 113. Brown on Act. 132, 432. 1 Arch. N. P. 196, 454. *Oviatt v. Sage*, 7 Conn. 95.

S. Austin for plaintiff.

Assumpsit would lie against the party using the hay, under the circumstances found in this case. There was no tenancy in common between the parties, although the auditor has used that term; each owned one half of the hay in their own right; and when the defendant had used her half, the other half belonged to the plaintiff; and if she used it, she would be liable to pay for it,—and of course liable in this action, if used with the knowledge of the plaintiff.

The opinion of the court was delivered by

HALL, J. If the plaintiff and the defendant's wife are to be considered as having been tenants in common of the hay, the question, in regard to the charge for it, seems to be settled by the case of *Albee v. Fairbanks*, 10 Vt. 314,—where it was held, that one of two tenants in common of personal property could not recover of the other, in an action on book account, for having used more than his share of the common property.

If the parties, as is insisted by the plaintiff's counsel, were not, in strictness, tenants in common of the hay, it is not perceived how the claim for it would be aided in this action. In that case, the de-

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fendant would have been guilty of a tort, in the use of the hay without the plaintiff's permission, for which the plaintiff might recover in an action of trover, but which could not be chargeable on book. Under any view of the case, we feel bound to consider the judgment of the county court, so far as it regards the charge for the hay, as erroneous.

The judgment of the county court is therefore reversed, and judgment is to be rendered for the plaintiff for the smaller sum found by the auditor.

The defendants, having prevailed in their exceptions, are to recover costs in this court, to be set off against the judgment of the plaintiff, and execution to issue for the balance.

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**ROYAL ABBOTT, Administrator *de bonis non* of BENJAMIN PORTER,
v. JOSEPH CLARK.**

A party of record may call the opposing party as a witness, with his consent, or a co-party, they being divested of all interest in the suit. This is the utmost extent, to which the authorities upon this subject have gone.

An administrator *de bonis non*, in whose name a suit is progressing, is not so divested of all interest as to be a competent witness in the case, notwithstanding it may appear, that the suit was commenced prior to his appointment, and that the estate which he represents is clearly solvent.

A married woman can only be admitted as a witness in a case, when her husband would be a competent witness in the same case.

ASSUMPSIT for the use and occupation of a dwelling house previous to the decease of the said Benjamin Porter. Plea, the general issue, and trial by jury, June Term, 1846,—KELLOGG, J., presiding.

On trial it appeared that this action was commenced by the executor of Porter, who had subsequently deceased, and that Royal Abbott was then appointed administrator *de bonis non* of Porter, and that the estate of Porter was unquestionably solvent; and the plain-

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tiff, to prove that the defendant hired the house of Porter, offered as a witness Ruth M. Abbott, the wife of the said Royal Abbott. To the admission of this witness the defendant objected, upon the ground that her husband was party of record and interested in the event of the suit; and she was excluded by the court,

Verdict for defendant. Exceptions by plaintiff,

E. Weston and P. Perrin for plaintiff.

Abbott's interest in the suit was merely nominal, and his wife should have been permitted to testify. 2 Stephens' N. P. 1735, 1743. *Warrall v. Jones*, 20 E. C. L. 177. The statute,—Rev. St. 288, § 12,—merely directs as to the manner of collecting costs, and fixes no eventual liability upon executors and administrators, which did not exist at common law.

L. B. Vilas for defendant.

The interests of husband and wife are identical; and if, in this case, the party himself would not be a competent witness, neither would his wife. It is an inflexible rule of evidence, that parties of record, whether in civil actions, or criminal prosecutions, are not admissible witnesses. *Commonwealth v. Marsh et al.*, 10 Pick. 57. 1 Phil. Ev. (C. & H.) 69. *Greenl. Ev.* 378. *Sears v. Dillingham*, 12 Mass. 358. *Fox v. Whitney*, 16 Mass. 118. An executor, though indemnified against costs, is not competent. *Page v. Page* 15 Pick. 368. It is sufficient to exclude the witness offered, that he is party to the record, without regard to his interest. *Frear v. Evertson*, 20 Johns. 142. *Bennington v. McGennes*, 1 D. Ch. 44.

The opinion of the court was delivered by

KELLOGG, J. The relation in which Ruth M. Abbott stands to the plaintiff is such as to render her an incompetent witness, unless the plaintiff could legally have been admitted as a witness in the case. This is admitted in the argument, and we think very correctly; for their interests are identical. The question, then, arises, is the plaintiff a competent witness?

Formerly it was regarded as a well settled principle, that a *party of record* could never be admitted as a witness in the suit, except by consent of the opposite party. That rule, however, has been relaxed by the more recent decisions. The reason of the rule was, the sup-

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posed interest of *every party* upon the record; and we know of no other. If, then, a case should arise, in which a party of record was divested of all interest in the event of the suit, we see no reason why, upon proper application, he should not be admitted a witness. So are the recent decisions in the English courts and in the courts of some of the neighboring states. 20 E. C. L. 177. 11 Conn. 342. 12 Conn. 134. The same principle was fully recognized by this court in the case of *Sargeant v. Sargeant et al.*, 18 Vt. 371. It may, then, be regarded as a settled principle, in this state, that a party of record may call the opposite party, with his consent, as a witness, he being divested of all interest in the suit. The question then arises, was the plaintiff divested of all interest in the suit?

He is clearly liable, in the first instance, for the costs of the suit; for the statute expressly so provides. But it is said, that, by statute, he is authorized to charge the costs, so allowed against him, to the estate, and that therefore his interest is removed, in the case of a solvent estate. It must, however, be borne in mind, that the probate court may not allow these costs; for the law only contemplates this allowance, in the event that the suit has been prosecuted *bona fide*. If he should fail in the suit, may it not be questioned, whether it was *prosecuted in good faith*? And to avoid this risk, would he not have an interest to recover in the suit? We think he would. Consequently he was not free from interest, so as to render his wife a competent witness in the suit.

But, suppose the plaintiff divested of all interest in the event of the suit, is it true, that he could claim the right to testify, without the consent of the other party. And if he could not claim this for himself, neither could he claim it for his wife. Now we are not aware of any authorities to sustain such a claim. None such have been produced, nor do we believe any such are to be found. We believe the utmost extent, to which the authorities upon this subject have gone, is, to allow a party of record to call the *opposing party, with his consent*, or a co-party, they being divested of all interest in the suit. The case at bar, then, is clearly distinguishable from the adjudged cases, which have been brought to our notice.

The witness was properly excluded, and the judgment of the court below is affirmed.

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ALFRED H. HENRY v. EDMUND TILSON, JR.

It being required by the statute, that a collector, who commits a person to jail for non-payment of a tax, should certify, upon the copy of his warrant left with the jailor, "his doings in relation to the delinquent," it is necessary, that his certificate should contain all the facts requisite to justify him in making the arrest and imprisonment; and it is not competent for the collector, in an action against him for false imprisonment, to supply the omission of these facts in his certificate by parol evidence.

A statement by the collector in such certificate, that, "after *legally notifying*" the delinquent of the time and place when and where he would be to receive the tax, no goods, &c., being shown to him, or found within his precinct, he arrested the body, &c., is not sufficient, to show that he had given the delinquent the six day's notice required by law.

Public ministerial officers must set forth, in their returns, the acts done by them, that the court may judge of their sufficiency.

TRESPASS for false imprisonment. Plea, the general issue, with notice that the defendant, as constable of Braintree, arrested the plaintiff and committed him to jail, by virtue of several warrants for the collection of taxes legally assessed against him; which was the trespass complained of. Trial by jury, June Term, 1845,—HEBARD, J., presiding.

On trial the defendant offered in evidence the several warrants described in his special notice, with his returns and the amount of the plaintiff's taxes endorsed thereon; to the admission of which the plaintiff objected, upon the ground that the returns were insufficient. The returns were similar; and the defendant set forth in them, that, "after legally notifying" the plaintiff of the time and place when and where he would be to receive his tax, there being no goods, &c., shown to him, nor found within his precinct, he took the body of the plaintiff and committed him to jail, and delivered to the jailor a true and attested copy of the warrant and return; and there was appended to each of the returns a memorandum of the amount of the tax and of the collector's fees. No other certificate, or memorandum, was left with the jailor. The defendant, in aid of his returns, then offered parol evidence, tending to prove,

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that, prior to the arrest of the plaintiff, he gave the plaintiff six days notice of the amount of his several taxes, and of the time and place when and where he would call to receive them, and that then the defendant had well grounded apprehensions that the plaintiff was about to leave the state without paying the taxes, and that in consequence thereof he arrested the plaintiff and committed him to jail. To the admission of all this evidence the plaintiff also objected; but the objections were overruled by the court.

Other questions were raised upon the bill of exceptions, and were argued by the counsel; but no decision was made in respect to them by the supreme court.

Verdict for defendant. Exceptions by plaintiff.

E. Weston and L. B. Peck for plaintiff.

I. The certificates, or returns, of the defendant upon the warrants were insufficient. 1. The time he gave the notice and the time and place he would receive the taxes should have been stated, so as to show the sufficiency of the notice, and that six days had elapsed before the arrest and commitment. 2. They should have stated, that he was there at the time and place to receive the taxes, and that the plaintiff neglected to attend and pay. 3. If he committed the plaintiff, because he had just reason to apprehend that the plaintiff was about removing, &c., he should have so *certified*. 4. He should have certified for what the tax was raised, and the amount of the tax, and against whom. Rev. St. 373, §§ 4, 9, 10.

II. Parol evidence ought not to have been received in aid of the returns. 1. Because all the doings of the defendant, relative to the plaintiff, should have been shown by the returns, or certificates, on the copies of the warrants, he being required by law so to certify. Rev. St. 373, § 10. 2. Because the defendant, in his notice, states that he left with the jailor, on the copies of the warrants; certificates of his doings relative to the plaintiff; and having so done, he should, by every principle of law and pleading, be confined to the certificates. *McDaniels v. Bucklin*, 13 Vt. 279. 3. Having attempted to certify, on the copies of the warrants, one cause for the arrest and imprisonment, the defendant should not have been permitted to show, by parol, another cause for the same.

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J. P. Kidder and **L. B. Vilas** for defendant.

1. The court did not err, in permitting the copies of the warrants, with the amount of the taxes and defendant's return, which he left with the jailor, to go to the jury. It was most certainly necessary for the officer, for his justification, to have left with the jailor an attested copy of his warrant, with a certificate of his doings thereon; Rev. St. 373; therefore, this being his duty, whatever return he might have made in the premises should be proper and legitimate evidence for his justification. *Hathaway v. Goodrich*, 5 Vt. 65.

2. Whatever the returns do not prove the defendant may prove by parol. *Hathaway v. Goodrich*, 5 Vt. 65. If an officer neglect to make a return of a sale on an execution, he may prove the same by parol. *Gates v. Gaines*, 10 Vt. 346.

The opinion of the court was delivered by

HALL, J. Several objections have been made to the verdict in this case; only one of which has been considered by the court.

It appears from the bill of exceptions, that the defendant (in aid of the certificates of the collector upon the copies of his warrants lodged with the jailor) was permitted to introduce parol evidence, to prove that before arresting the body of the plaintiff the defendant had given him six days notice of the amount of his tax, and of the time and place when and where he would attend to receive it; and also, that the defendant had just reason to apprehend, that the plaintiff was about removing out of the town. But the existence of one or the other of these facts was necessary, to justify the collector in arresting the body of the plaintiff; (Rev. St. ch. 77, sec. 2;) and the question that arises is, whether these facts must appear in the certificates of the collector upon the jail copies, or whether they may be shown by other evidence.

To sustain the ruling of the court the counsel for the defendant rely upon the case of *Hathaway v. Goodrich*, 5 Vt. 65; where it was held, that other evidence than the certificate made by a collector upon his warrant, of a seizure and sale of personal property for taxes, might be properly given to the jury. But the decision in that case is put on the ground, that, as the collector was not required by law to make any return of his proceedings on the sale of personal property, his certificate would not be an official act, and consequently no

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evidence of his proceedings; and the distinction is taken between such a proceeding of a collector, where no certificate of his doings was required, and the return of an officer upon a process made in obedience to the requisitions of law. If such return had been required by law, it was conceded, that parol evidence would have been inadmissible, to prove the facts which should have appeared by the return.

By sec. 10 of chap. 77 of the Revised Statutes it is provided, that, when any person shall be committed for taxes, "the constable shall leave with the keeper of the jail an attested copy of his warrant, *and shall certify his doings thereon in relation to such delinquent.*" The collector, in this case, being required by law to certify his doings upon the jail copies, it would seem to follow, in conformity with the reasoning of the court in *Hathaway v. Goodrich*, and in accordance with acknowledged rules of evidence in analogous cases, that his certificate of his doings as a public officer should constitute the proper evidence of his proceedings, and that such proceedings should not have been allowed to be shown by other proof.

If the facts necessary to the justification of the collector in arresting the body of the plaintiff sufficiently appeared in his certificates upon the jail copies, possibly the error in the admission of parol evidence might be disregarded, as being immaterial to the issue. But, on looking into the certificates, they are found to be deficient in that respect. None of them mention any thing in regard to the apprehension of the collector that the plaintiff was about removing from the town; but they all state, nearly in the same words, that, "after *legally notifying him* of the time and place when and where the collector would be to receive the tax," and no goods, &c., being shown to him, or found, he arrested the body, &c. This general statement, that the collector had given the plaintiff *legal notice*, we think insufficient, to show that he had given him the six days notice required by law. It is recognized by the court, in *Briggs v. Whipple*, 7 Vt. 18, as a well established principle, that a general allegation, by a collector, that he had *proceeded according to law*, would be insufficient, where any statement of his proceedings was necessary. It seems, indeed, to be well settled, that public ministerial officers must set forth the acts done by them, that the court, and not themselves, may judge of their sufficiency. *Perry v. Dover*, 12 Pick.

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206. *Purrington v. Loring*, 7 Mass 392. *Wellington v. Gale*, 13 Mass. 483.

The statute making it the duty of the collector to certify on the copy of his warrant, lodged with the jailor, "his doings in relation to the delinquent" tax payer, we think his certificate should contain all the facts necessary to justify him in making the arrest and commitment. In this case, such facts not being certified, the judgment of the county court is set aside and a new trial granted.

**GEORGE SLEEPER v. TRUSTEES OF NEWBURY SEMINARY AND
WILLIAM M. WILLETT.**

All the material facts, necessary to show that the law has been complied with in the levy of an execution upon real estate, should appear by the officer's return.

Therefore, where it appeared from an officer's return of such levy, that the whole of the estate described in the return belonged to the debtor in the execution, and that the execution was levied upon an undivided portion of such estate, and it was not stated in the return, that, in the opinion of the appraisers, the estate could not be divided without injury, the levy was held invalid to pass the title.

EJECTMENT for a dwelling house, with a shed attached, and the land whereon they stand, in Newbury. Plea, the general issue, and trial by jury, June Term, 1846,—KELLOGG, J., presiding.

On trial the plaintiff offered in evidence an *alias* execution, which issued upon a judgment duly rendered in his favor against one Timothy Morse, and the officer's return thereon, showing that the execution was levied upon three undivided fourth parts of the premises described in the declaration. It appeared from the return, that the execution debtor was the owner of the entire estate in fee; but it did not show any reason, why the portion levied upon was not des-

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cribed in severalty. The defendant objected to the evidence, and it was excluded by the court.

Verdict for defendants. Exceptions by plaintiff.

L. B. Vilas for plaintiff.

If the levy conforms to any case, provided for by the statute upon this subject, it is to be presumed that it was made in accordance with that provision of the statute, and the levy should be held valid. The statute,—Rev. St. 242, § 30,—provides, that real estate may be set off in the same way, in which this levy was made.

L. B. Peck and A. Underwood for defendants.

The levy of an execution upon real estate is a proceeding *in iuris*, and the creditor acquires no title, unless the provisions of the statute are pursued. The levy must be by metes and bounds,—Rev. St. 241, § 20,—except in certain cases, which are provided for by the statute; Rev. St. 242, §§ 29, 30. When the levy is not made by metes and bounds, it should appear by the officer's return, that the case falls within one of the exceptions made by the statute. In the case at bar the levy was made upon an undivided portion of the estate; but no reason is stated for this proceeding, and the court will not presume that any existed.

The opinion of the court was delivered by

HALL, J. The only question in the case is, whether the levy of the execution upon an undivided portion of the land is valid to pass the estate?

It appears from the returns, that the debtor was the owner in fee of the whole of the house, shed and land levied upon. In such case the statute contemplates [Rev. St. chap. 42, § 20] that the officer shall, in general, set off the land levied upon by metes and bounds, and not an undivided portion of it. But the legislature suppose, that cases may occur, in which a setting off by metes and bounds would prove greatly injurious to the interest of the parties; and in the 30th section of the same chapter it is provided, that when, in the opinion of the appraisers, any real estate cannot be divided without such great injury, the officer may set off such an undivided part

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thereof, as shall be sufficient to satisfy the execution. Whether the appraisers were of such opinion in this case does not appear.

This proceeding, by which the estate of one man is passed to another by the operation of law, has always been considered a proceeding *stricti juris*, and hence it has uniformly been held in this state, as well as in others having similar statutes, that all the material facts, necessary to show that the law has been complied with, should appear by the officer's return.

It is obvious, that, in most cases, an ownership of real estate in common is not desirable, and that, if a creditor were allowed, as matter of right, at his election, to levy upon an undivided interest of land held in severalty, he might make use of his execution greatly to the vexation and injury of the debtor. For this reason the legislature have provided, that such a levy shall not be made, but for good reasons, to be adjudged and determined by the appraisers.

This adjudication is a distinct and substantial requirement of the statute, important to the protection of the interest of the debtor, and should not be allowed to rest in parol, but should, as we think, appear, by the officer's return, to have been duly made. Such adjudication not appearing by the return, the judgment of the county court, which was against the validity of the levy, is affirmed,

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TOWN OF TUNBRIDGE v. DANIEL TARBELL, JR.

When the selectmen of a town lay out a highway, the town are entitled to the whole period, to the time when the road is ordered to be opened for work, to arrange and settle the question of damages with the land owners ; and a land owner cannot, previous to that time, petition a justice of the peace, under the statute, to appoint commissioners to appraise the damage sustained by him.

It is competent for the selectmen of a town and the owner of land, through which the selectmen have laid a highway, to settle the question of dam-

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ages by a reference, pursuant to the provisions of the statute, at any time after the survey of the road, although the survey may not, at the time, have been recorded; and an award by the referees will preclude the land owner from bringing a petition for the appointment of commissioners to appraise his damages.

CERTIORARI from the decision of Calvin Blodgett, a justice of the peace, in appointing commissioners, upon the petition of the defendant, to appraise the damages sustained by him by reason of the laying out of a highway through his land by the selectmen of Tunbridge, and in accepting and rendering judgment upon the report of the commissioners, awarding damages to the petitioner.

It appeared from the return of the justice's proceedings, that on the first day of June, 1844, the selectmen of Tunbridge surveyed and laid out a public highway through land owned by the defendant, and ordered the same to be opened for work by the first day of December, 1844. This survey was recorded in the town clerk's office on the twenty-third of September, 1844. On the fourteenth of June, 1844, the defendant and one Moody, through whose land the highway was also laid, agreed with the selectmen to refer to certain arbitrators the question of damages; and the arbitrators awarded, upon the same day, that the defendant was not entitled to any damages, and that Moody was entitled to ten dollars. This award was also recorded in the town clerk's office, September 23, 1844. On the twenty-eighth of September, 1844, the defendant petitioned the justice, Blodgett, to appoint commissioners, pursuant to the statute, to appraise the damages sustained by him by reason of the laying out of the highway; and on the fourth of November, 1844, the matter came on for a hearing before the justice. The selectmen objected to the appointment of commissioners, on the ground that the matter had been adjudicated by the reference, above mentioned; but the petitioner insisted, that the reference was not binding upon him, for the reason that the selectmen had not caused the survey of the highway and the petition upon which it was founded to be recorded in the town clerk's office at the time the reference was had, and that they had not acquiesced in the award by paying the amount awarded to Moody nor delivered to him the award. The selectmen also objected to the appointment of commissioners upon the ground that the petition was premature. The justice overruled the

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objections and appointed commissioners, and subsequently accepted the report of the commissioners, awarding to the petitioner forty dollars damages, and ordered that amount, and the cost, to be paid to the petitioner by the first of May, 1845.

A. P. Hunton for plaintiffs.

There was error in the proceedings before the justice. 1. The defendant's claim for damages had been settled by a reference and award; Rev. St, 126, §§ 15, 16. 2. The application was made before the road was open to be worked; Rev. St. 126, § 16. The justice had no jurisdiction; *Emerson et ux. v. Reading*, 14 Vt. 279. *Paine v. Ely*, N. Ch. 20, 21. The town had no right to enter upon the land for any purpose, until the time fixed for opening the road to be worked had expired, and the damages paid, if agreed upon, or the sum awarded paid; Rev. St. 128, § 24. *Patchin v. Morrison*, 3 Vt. 590. *Stiles v. Middlesex*, 8 Vt. 436.

L. B. Vilas for defendant.

The record and proceedings are presumed to be legal, unless the contrary appears. 1. We insist, that the application for the appointment of commissioners may be made at any time, after the laying of the road, until sixty days after the road is opened to be worked. 2. The other objection is founded upon an arbitration as to the damages, before the road was legally laid out by causing the survey to be put upon record. The statute gives no power to refer the question of damages, until the road is laid out; and any proceeding of this kind, before the road is laid out, is not binding on the town, and consequently not binding on the petitioner.

The opinion of the court was delivered by

KELLOGG, J. It is insisted by the complainants, that the proceedings in the court below were prematurely commenced, inasmuch as the time fixed by law, when the road was to be open for work, had not arrived, when Tarbell presented his petition to justice Blodgett and procured the appointment of commissioners to assess his damages; and that for this error the proceedings before the justice should be quashed.

The time fixed by the selectmen, when the road should be open

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for work, was the first of December, 1844. It was the earliest period, which, by law, the selectmen could fix for that purpose, it being six months after the survey. Whether this exception is well taken must depend upon the construction of that clause of the statute, authorizing proceedings upon petitions for the re-assessment of damages. The statute provides, "That if any person interested in lands, through which a highway shall be laid out or altered by the selectmen, shall not be satisfied with the sum offered, or if no sum shall be offered, and if the parties shall not agree to refer the same, he may, within sixty days after the highway shall be opened to be worked, and not after, apply to a justice, by petition in writing," &c., "to appoint commissioners to appraise the damages."

We are not aware, that the question arising in the present case upon this section of the statute has ever been decided by this court. But the case of *Emerson et ux. v. Reading*, 14 Vt. 279, is believed to be somewhat analogous. It was a proceeding similar to the present, and upon a statute somewhat like the one, under which the present proceedings were had. It was held, in that case, that no proceedings could be taken under the statute by the land owners, to have their damages appraised, until sixty days after the road was opened by the selectmen; and that, until the road was opened, the justice had no jurisdiction of the subject. Applying the reasoning of the court in that case, to the case under consideration, it would seem to lead to the result, that the proceedings taken by the defendant before the justice, for the appraisal of his damages, were premature and unauthorized by the statute, and that the justice had no jurisdiction of the subject. Indeed, we think it very obvious, that the statute contemplates, that the towns shall have the whole period, up to the time when the road is ordered to be opened for work, to arrange and settle the question of damages with the land owners; and, upon the failure of the selectmen to do this, a period of sixty days thereafter is given to the land owners, to apply to a magistrate for the appointment of commissioners to appraise their damages. The proceedings before the justice were premature and erroneous.

It is farther urged, that there was error in the proceedings, in this, that, inasmuch as the selectmen and Tarbell had, by mutual agreement, submitted the claim for damages to referees, who had awarded

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that Tarbell was not entitled to any damages, no commissioners should have been appointed, or farther proceedings had in the premises.

This award, for aught that appears, was valid and binding upon the parties. It was competent for the selectmen and Tarbell, by mutual agreement, to settle the question of damages by a reference, pursuant to the provisions of the statute, at any time after the survey of the road, although the same had not been recorded. The want of a record of the survey would not render the award invalid. It was therefore error to disregard the award of the referees made in the case. And for these errors the proceedings before Mr. Justice Blodgett must be quashed.

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THEOPHILUS MOSSEAU v. CHARLES BRIGHAM.

The supreme court cannot, on exceptions, review any matter within the discretion of the county court.

Although it is a general rule, that a record of court imports absolute verity and cannot be contradicted by parol evidence, yet this rule does not forbid the exercise of a revisory power, by a court of general jurisdiction, over its own records.

This power is incident to the county court, in this state, as well as to the supreme court, and is properly exercised, when a judgment by default has been entered by mistake, or fraud.

But the revisory power of a justice of the peace has always been understood to be terminated by the expiration of two hours after the rendition of his judgment.

The effect of the statute,—Rev. St. c. 33, § 8,—giving the county court authority, in their discretion, to set aside a judgment rendered by a justice of the peace by default, when the party has been deprived of his day in court by fraud, accident, or mistake, is to give to the county court the same power, in examining the proceedings of a justice, in cases within the statute, which they might exercise in examining their own proceedings.

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In this case judgment was rendered by a justice of the peace by default, and the justice certified in his record, that notice to the defendant of the pendency of the suit was proved; but it was held, that the defendant, on petition to the county court, founded upon the Revised Statutes, chap. 33, sec. 8, might prove, by *parol evidence*, that he did not in fact have any notice of the suit prior to the rendition of the judgment.

THIS was a petition to the county court to set aside a judgment, rendered by a justice of the peace by default, and to be allowed a trial in the case, founded upon the Revised Statutes, chapter thirty three, section eight,—the petitioner alleging, that he had no notice of the suit until after the rendition of the judgment,—and was heard by the county court, June Term, 1845, HEBARD, J., presiding.

It appeared from the record of the justice of the peace in the original suit, that notice to the petitioner of the pendency of that suit was proved, prior to the rendition of the judgment against him by default; but the petitioner offered to prove, by *parol evidence*, that he did not in fact have notice of that suit, until after the judgment was rendered. To the admission of this evidence the petitionee objected; but the objection was overruled, and the evidence was received; and the court, from the evidence, found the fact to be, that the petitioner had no notice of the original suit, prior to the judgment, and decided, that the prayer of the petitioner be granted, and that he have leave to enter his copies, and that the cause stand for trial. Exceptions by petitionee.

C. B. Leslie and L. B. Peck for petitionee.

1. The record of the justice in the original suit shows that the petitioner had notice of that suit; and to avoid and contradict the record, in this particular, the county court admitted *parol evidence*. This, it is believed, is in contravention of the long established rule, that *a record cannot be contradicted by parol*. *Spalding v. Chamberlin*, 12 Vt. 538. *Barnard v. Flanders*. Ib. 657. *Pike v. Hill*, 15 Vt. 183. *Sawyer v. Joiner*, 16 Vt. 497. 1 Sw. Dig. 750. 8 Conn. 375. *Olcott v. Hutchins et al.*, 4 Vt. 17. 1 Stark. Ev. 195, n. Ib. 202—215. 3 Ib. 1278. *Woods, Adm'r, v. Pettis et al.*, 4 Vt. 556. *Peake's Ev.* 21, 22, n. *Dickson v. Fisher*, 4 Burr. 2267. *Fox v. Hoyt*, 12 Conn. 491. *St. Albans et al. v. Bush*, 4 Vt. 58. Phil. Ev. 218, 237, n. (a.) Co. Lit. 260. 1 East 355.

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2. The rule is well settled, that the judgment of a court of competent jurisdiction, upon a question or point in issue, is *conclusive* between the parties. If such were not the rule, there would be no end to litigation. 2 Aik. 381. 2 Greenl. Ev. 16. 4 Pet. 393, 408. 17 Vt. 302. 12 Conn. 491. 6 Conn. 558. 1 Stark. Ev. 183-186, 208-211. 1 Greenl. Ev. 590, 595, 596, n. 2.

A. Underwood for petitioner.

1. Although the principle is true, that a record imports absolute verity, yet it is not applicable to cases of this description. Indeed, the rule has always been subject to some exceptions. Cowp. 727. 1 H. Bl. 75. 1 Anstr. 8. 3 Ves. & B. 42. 2 Marsh. 392. 7 Taunt. 97. 3 Bl. Com. 24, note 3. There is much reason, that that part of a record, which shows "notice proved," should be made an exception. The record is always made from *ex parte* evidence. The party charged with notice is not present to contradict it, and has no opportunity to be heard.

2. It is contended, that the rule is not applicable to a case arising under Sec. 8 of chap. 33 of the Revised Statutes. Indeed, it appears to have been the express object of the legislature, in this enactment, to relieve a party from the operation of this rigid rule. The Statute pre-supposes a regular judgment, as *shown by the record*, and one that cannot be reached by the ordinary process of *audita querela*. If the record is to be held beyond the reach of contradiction, then the statute is entirely nugatory.

3. This statute is to be regarded as extending the time for entering an appeal, in certain cases, in the discretion of the county court, from two hours to two years; and the granting the prayer of the petition has the effect only to bring up the original suit, as if appealed. The record of a case, in contemplation of law, is made as the suit progresses, and is not considered complete, until the suit is ended. While in progress, the record is under the control of the court, subject to be amended, and that to be shown by parol testimony. The process of petition merely continues the progress of the original suit. By it the county court take appellate jurisdiction, and make up a record of an appealed case, instead of its remaining the record of a case complete and ended in a subordinate jurisdiction.

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4. It is insisted, that the ordering the original suit to be entered on the docket and stand for trial was a matter of discretion, not to be revised in this court.

The opinion of the court was delivered by

HALL, J. The statute, under which this petition was brought to the county court, authorizes that court, *in its discretion*, to give or refuse relief, and upon such terms as it shall deem reasonable. Unless, therefore, the record of the fact of notice, made by the justice, interposed such an obstacle in the way of relief, as to prevent the exercise of any discretion by the county court on the subject, it is obvious, that we have nothing to do with the case. If that court could, under any state of facts, have received evidence in opposition to the record of notice, then the whole matter came within its discretionary power, and we cannot say, that it erred in matter of law. For it is well settled, that this court cannot, on exceptions, review any matter within the discretion of that court.

There is no doubt of the correctness of the general doctrine, insisted on by the counsel for the petitionee, that the record of a court having jurisdiction of the subject matter imports absolute verity. The record is to be taken to be true, not only when it comes collaterally in question, but also when the judgment, of which it is evidence, is sought to be enforced, or is made matter of defence; and even when the proceeding is upon a review of the judgment itself, for error in law, as upon writ of error, and *certiorari*, the truth of the record cannot be disputed.

But this rule does not forbid the exercise of a revisory power by a court of general jurisdiction over its own records. It is a power incident to such courts, to inquire into the correctness of their own proceedings, to correct their records according to the truth, if erroneously made, or to relieve a party against the unjust operation of a record, on ascertaining, by a direct inquiry into the matter, that the record ought not to have been so made. This proceeding is usually on motion, founded on affidavits and notice; and the power is exercised in a summary way, whenever the court, in its sound discretion, considers that the furtherance of justice requires it. This power is incident to the county courts, in this state, as

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well as to this court, and is properly exercised, when a judgment by default has been mistakenly or fraudulently entered.

Thus, in *Scott v. Stewart*, 5 Vt. 57, a judgment had been rendered by default in the county court, which judgment, on petition to the same court at a subsequent term, on due notice to the opposite party, had been set aside and the case opened for trial. On exceptions to the jurisdiction of the county court over the matter, the case was carried to the supreme court, and it was there held, that the county court had a common law jurisdiction and authority to set aside such default, either upon notice, or petition.

The county court being perpetual in its character, there is no obstacle in the way of the exercise of this revisory power over its proceedings. But the authority of a justice of the peace is temporary, subject to be terminated at any time by his death, or removal from the state, and necessarily ending with the limited term of his office. Hence the impracticability of the proper exercise of such power by a justice's court, if it were not otherwise objectionable. A justice's revisory power has always been understood to be terminated by the expiration of two hours after the rendition of his judgment; and the object of the legislature, in the statute under which this petition was brought, seems to have been, to give the county court a similar power over the proceedings of a justice, when a party has been deprived of his day in court by fraud, accident, or mistake, that the county court might exercise over its own proceedings.

It cannot be doubted, that the county court might and would, on the suggestion by the party of either fraud, accident, or mistake, inquire, on motion, into the correctness of an entry in that court of *notice proved*; and if it should appear, on such inquiry, that the entry had been thus made, grant him relief, by opening the case for trial. And as we think the same power is conferred by the statute on the county courts over a justice's judgment, rendered by default, we are of opinion, that the justice's record did not present any obstacle to an inquiry into the real fact in regard to notice, and that there is, therefore, no error in the judgment of that court, in granting the prayer of the petitionee.

If the revisory power of the county court, over the judgments of a justice, could not be exercised, where it appeared from the record that the defendant had had notice of the suit, by disproving the no-

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tice, a large class of the most probable cases of accident and mistake, if not of fraud, would be excluded from its consideration. The fact of notice usually appears in the officer's return on the writ; and that return, becoming a part of the record, is of equal verity, between the parties to the suit, with a record of the proof of notice. If the officer, in his copy left with the defendant, by mistake inserts a more distant day for the holding of the court, than that in the writ, or by mistake delivers his copy to a person other than the defendant, by reason of which a default is taken, shall the party, in such case, be allowed to enjoy the fruits of an unjust judgment, and the defendant be turned over to an uncertain remedy against an innocent officer? Or may not the county court, on such terms as shall preserve the rights of the plaintiff, set aside the default, and allow the injured party a trial?

Such a case presents quite as strong a case for relief, as a case where the defendant, having notice, is prevented by some accident from reaching the place of trial at the appointed time. In the latter case additional precautions in the defendant might, perhaps, have guarded him against the injury; but in the former no diligence of the party could prevent it. Both classes of cases seem to have been designed to be provided for by the statute; and, as the county court is clothed with the power of granting the relief on such terms as will preserve the rights both of the plaintiff and defendant, the surerance of justice, as well as the language and intention of the legislature, appear to require, that the statute should receive the extended construction we have given it.

The judgment of the county court is affirmed, with costs of this court; and the county court are to proceed to hear and determine the justice suit, as upon appeal.

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THE PRESIDENT, DIRECTORS & CO. OF THE GRAFTON BANK v.
WILLIAM DOE, CALEB STEVENS, JR., JOHN ATWOOD, BENJA-
MIN ATWOOD, FRANK P. JOHNSON, MOSES JOHNSON AND HI-
RAM JOHNSON.

IN CHANCERY.

The statute of limitations does not begin to run upon a demand, until the *principal*, or at least some separate and distinct portion of the principal, becomes due and payable,—and then only upon such distinct and separate portion. The interest, accruing from year to year, is not thus separated from the principal demand, and consequently the statute of limitations does not run upon it, until the principal is barred by the statute.

The neglect of the holder of a promissory note, secured by mortgage, to present the note for allowance by the commissioners appointed to receive and adjust claims against the estate of the deceased maker, does not preclude him from afterwards enforcing the mortgage security ; it merely precludes him from claiming any dividend or portion of the assets of the estate in the hands of the administrator.

Courts are never at liberty to presume payment from *mere lapse* of time, in any period less than that which is fixed by the statute of limitations.

The answer of a defendant to a bill of foreclosure, averring distinctly, that, at a certain time, he paid to the administrator of the mortgagor a certain amount of money, which sum the administrator, in presence of the defendant, paid to the orator, to be applied to the payment of the mortgage note, is strictly responsive to the bill, and therefore legitimate evidence in the case.

APPEAL from the court of chancery. The orators alleged in their bill, that Martha Porter, on the eighth of September, 1823, was indebted to the orators in the sum of five hundred dollars, specified in a promissory note of that date, payable in four years, with interest annually ; that on the twelfth of March, 1825, she executed to the orators a mortgage deed of certain land in Newbury, to secure the payment of said note ; that she died September 27, 1825, leaving a will ; that William T. Haddock was appointed executor of her will in New-Hampshire, and administrator, with the will annexed, in Vermont ; that Haddock, by virtue of a power contained

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in the will, sold and conveyed, by deed, the mortgaged premises, in separate and distinct parcels, to the several defendants named in the bill, and those under whom they claim; and that the note still remained due and unpaid. And the orator prayed for a foreclosure of the defendants' equity of redemption in the premises. The subpoena was issued August 4, 1841, and was served upon the defendants September 1, 1841.

The defendants answered, admitting the execution of the note and mortgage by Martha Porter to the orators, but insisting upon the statute of limitations, and insisting that the note should have been presented to the commissioners upon Martha Porter's estate; and they also averred, that they were informed and believed, that Haddock had paid the note to the orators;—and the defendant Doe alleged, that he, as agent of his father, to whom Haddock conveyed that portion of the mortgaged premises now held by this defendant, did, immediately after the conveyance by Haddock of the mortgaged premises, pay to Haddock, in the banking house of the orators, at Haverhill, the sum of four hundred dollars, and that Haddock then and there, in the presence of this defendant, paid the same sum to the cashier of the orators, towards the mortgage note; and the defendant Stevens alleged, that soon after the payment of the purchase money of the mortgaged premises, by the purchasers, to Haddock, he, feeling anxious about the mortgage and that the same should be discharged by Haddock, went to the banking house of the orators and inquired of the cashier respecting the same, and that the cashier then informed him, that Haddock had paid the mortgage, and that he thereupon so informed the purchasers.

The defendants also filed a cross bill, setting forth, in substance, the matters alleged in their answers to the original bill, and making the orators in that bill and Daniel Blaisdell, who was administrator *de bonis non* upon the estate of Martha Porter, defendants; and the orators in the cross bill prayed, that the defendants might be required to disclose, whether the note, or any part thereof, had been paid; and, if not, that it might be paid from the assets in the hands of Blaisdell, as administrator. The defendants in the cross bill answered,—the Grafton Bank denying that the note, or any part of it, had been paid; and Blaisdell alleging that all the assets, which

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had come to his hands as administrator, had been distributed pursuant to a decree of the probate court in New Hampshire.

The answers to the original bill and cross bill were traversed, and testimony was taken upon both sides,—the substance of which sufficiently appears from the opinion of the court.

The court of chancery, December Term, 1844,—HEBARD, Ch.—decreed, that the cross bill be dismissed, with costs, that the original bill be dismissed, as to Hiram Johnson, with costs, and that the other defendants pay the sum due in equity upon the mortgage note, reported by the master to be \$1420.95, by a day fixed, or be foreclosed of all equity of redemption in the premises. From this decree the defendants appealed.

L. B. Peck and S. Austin for orators.

1. This suit was instituted within fourteen years after the note became due; and, as there is a subscribing witness to the note, the case is not within the statute of limitations.

2. There is no evidence tending to show that the note has been paid, excepting the deposition of Thomas J. Doe, who testifies to the declaration of Haddock and of the orators' cashier, Bunce. The orators are not affected by these declarations; and the deposition should be suppressed. The depositions of Bunce and Page disprove these admissions, and show that they were not true, if made. The answer of the orators to the cross bill is also evidence against the defendants.

A. Underwood for defendants.

1. We insist that the orators are barred from a recovery, by reason of their not having presented their note before the commissioners upon the estate of Martha Porter. Sl. St. 353, § 91. In case of a note and mortgage, the note is the principal matter. The mortgage is only an incident; and if the debt is gone, by payment, or by discharge in any other way, by act of the parties, or by operation of law, the mortgage must share the same fate. *Martin v. Mawlin*, 2 Burr. 343. Sl. St. 343. 2 Fonbl. 490, n. *Hawkins v. King*, 2 Marsh. 109. *Barnes v. Lee*, 1 Bibb 526. *McDaniels v. Reed*, 17 Vt. 681. If this claim had been presented to the commissioners and disallowed, and no appeal taken, it will not be

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pretended, that the disallowance would not have been a good bar to a bill of foreclosure. *A fortiori* the orators should be barred, not having presented their claim; as the statute, in express terms, creates a *perpetual bar* for that reason. *Warren v. Saxby*, 12 Vt. 146. *Hunt v. Fay*, 7 Vt. 170. *McCollum v. Hinckley et al., Ex'rs*, 9 Vt. 143.

2. The orators are barred by the statute of limitations of fifteen years,—which applies equally to a bill of foreclosure and to an action of ejectment; *Hunt et al. v. Wickliffe*, 2 Pet. 201; *Lewis v. Marshall*, 5 Pet. 470; *Fonbl. Eq.* 243, 244; *Roosevelt v. Mark*, 6 Johns. Ch. R. 266; 4 Kent 187; *Staniford v. Tuttle*, 4 Vt. 82. *Collard's Adm'r v. Tuttle*, 4 Vt. 492. The statute began to run from the time the orators' cause of action *for the recovery of the land* first accrued. The cause of action, in this case, accrued in one year from the date of the note, or in one year from the day of the discount thereof, (April 30, 1825,) the note being on interest annually. Between either of these dates and the date of the subpoena more than fifteen years intervened. Sl. St. 289, § 6. Rev. St. 305, § 1. *Battley v. Faulkner*, 5 E. C. L. 288. *Smith v. Smith*, 15 Vt. 620.

3. The defendants insist, that the note was paid in 1826, and that the fact is made out from a fair balance of proof and the circumstances.

4. The court ought to *presume* payment from lapse of time and the other circumstances. 1 Stark. Ev. 34. *Conner v. Chase et al.*, 15 Vt. 782. 1 Greenl. Ev. 21, 47.

The opinion of the court was delivered by

KELLOGG, J. The defendants insist, that the orators are not entitled to a decree.

In the first place they say the cause of action is barred by the statute of limitations. The mortgage note bears date September 8, 1823, and is made payable in four years, with interest annually, and is witnessed. The subpoena to the orators' bill was issued August 4, 1841, and served September 1, 1841. The note, being witnessed, would not be barred by the statute, until the expiration of fourteen years after it fell due. By its terms it fell due on the 8th of September, 1827; and fourteen years from that time would

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expire on the 8th of September, 1841,—which was several days after the issuing, and even service, of the orators' process.

But it is said, that, as the note is made payable with annual interest, the *cause of action* accrued when the first year's interest fell due, and that the statute of limitations should be computed from that time. The note was discounted in the month of April, 1825; and, as the period fixed by the terms of the contract, for the payment of the interest yearly, was the 8th of September, it is believed, that no interest could legally be demanded upon the note anterior to September, 1826. This would be more than fourteen years previous to the commencement of this suit. When the next year's interest fell due, the eighth of September, 1827, it was less than fourteen years.

If this exception should prevail, we suppose it will hardly be contended, that it should operate upon any greater portion of the demand, than the orators could enforce the collection of; which was one year's interest. But we think that this exception is not well taken. It is true, that the orators' might have instituted their suit for the recovery of the year's interest; but they were not bound to do it. The statute does not begin to run upon the demand, until the *principal*, or at least some *separate* and *distinct portion* of the principal, becomes due and payable,—and then only upon such distinct and separate portion. The accruing interest from year to year is not thus separated from the *principal demand*; and consequently the statute of limitations does not run upon it, until the principal is barred by the statute.

It is farther insisted, that the orators' demand, the mortgage note, is barred by reason of its not being presented to the commissioners upon the estate of Martha Porter. It is unquestionably true, that the orators, by reason of their failure to present the note to the commissioners, are precluded from claiming any dividend or portion of the assets in the hands of the administrator, and will be compelled to rely solely upon the property pledged to them, the mortgaged premises, for obtaining payment of their demand. No adjudged case is produced to support this position of the defendants; and we think it cannot be sustained.

It is farther urged by the defendants, that the court should presume payment of the demand from lapse of time. We take it to be

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well settled, that courts are never at liberty to presume payment from *mere lapse* of time, in any period less than that which is fixed by the statute of limitations. To hold otherwise would virtually be a repeal of the statute. No doubt, lapse of time, connected with other circumstances and evidence tending to prove payment, may legitimately aid in establishing the fact. We do not, however, deem the lapse of time sufficient to establish the fact of the payment of the note, in this case.

The defendants farther insist, that the note was actually paid, and that this fact is satisfactorily established by the proofs in the case. The evidence, upon which the defendants rely as tending to show the payment of the entire amount of the note, is the testimony of Thomas J. Doe, who testifies to the declarations of Bunce, the cashier of the bank, made to him in 1827. This conversation is denied by Bunce. It is true, that this witness testifies, that in May, 1826, he paid to Haddock \$100, and that Haddock said he wanted it to pay to the bank to take up the mortgage with; but there is no direct evidence, that this money ever went to the bank. We are not therefore satisfied, upon this evidence, that the mortgage note was paid.

There is, however, evidence tending to show at least part payment of the note. The defendant Doe, in his answer, expressly states, that, soon after the conveyance of the land by Haddock, he, as agent for his father, paid to Haddock, at the bank of the orators, \$400,00, and that Haddock then paid the same money to the cashier, to be applied to the payment of the mortgage. The answer, in this respect, is strictly *responsive* to the bill, and therefore legitimate evidence in the case. This, however, is denied by Bunce. His denial is, and must necessarily be, of a negative character, that he has no knowledge, or remembrance, of the same. Page, the succeeding cashier, testifies to an examination of the books and papers of the bank, and that he finds no entry of money paid by Martha Porter, or others for her, to be applied upon the mortgage. The question then arises, is there any evidence in the case to corroborate and support the answer of Doe.

The orators have put into the case a transcript of Haddock's account with the bank, by which it appears, that, on the 26th of July 1826, he paid into the bank \$390,12; which is credited in his ac-

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count. This, we think, does, to some extent, sustain the answer of Doe. The time of the credit corresponds very well with the time of payment stated in the answer, which was soon after the conveyance of the land, the last of which was in the month of May, 1826. It is true, that the sums do not precisely correspond; but it would not be matter of surprise, that, after such a lapse of time, Doe should not recollect the precise sum which he paid; and if the sum was near \$400, that sum would be most likely to be impressed upon his mind. Now, we are inclined to believe, that the sum of \$380,12, the amount credited to Haddock on the 26th of July, 1826, was the amount paid by Doe to Haddock, and that the same was then understood by the parties to be paid towards the extinguishment of the mortgage. It is true, that the account shows that during the succeeding month the bank paid to Haddock, at different times, an amount equal to the aforesaid credit; yet we are induced to believe it was in violation of the understanding of the parties at the time the credit was entered, and a misapplication of the money. We think they were bound to apply that amount upon the mortgage note.

The result is, that the decree of the chancellor must be reversed and the case remanded to the court of chancery, with instructions to enter a decree for the orators, computing interest upon the orators' note from the month of April, 1825, to the 26th of July, 1826, and then deducting from the amount the sum of \$380,12, and casting interest upon the balance to the time of the decree; and that he allow such time to the defendant, to redeem the premises by paying the amount decreed to the orators, as the chancellor shall be advised is just and reasonable; the orators to tax no costs in this court; and the defendants' costs in this court to be deducted from the orators' costs in the court of chancery. The cross bill is to be dismissed without costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WASHINGTON.

APRIL TERM, 1847.

PRESIDENT,

Hon. STEPHEN ROYCE, CHIEF JUDGE.
Hon. ISAAC F. REDFIELD,
Hon. MILO L. BENNETT, } ASSISTANT JUDGES.
Hon. CHARLES DAVIS,

MARTIN C. RICE v. TOWN OF MONTPELIER.

It has been often determined by this court, in actions against towns for injuries occasioned by the insufficiency of highways, that whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road and entirely without fault on the part of the plaintiff are questions of fact, ordinarily mixed, however, with questions of law, requiring comment by the court.

But how far towns are bound to clear away obstructions, natural, or artificial, from that portion of the highway exterior to the wrought way, how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily, or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring field from a real or supposed necessity, or for such as may arise in attempting to pass a bridge, obviously unsafe, or dangerous, or in fording a stream in such case, are mainly questions of law, calling for special instructions from the court.

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In this case it appeared, that the plaintiff was travelling upon the highway in the village of Montpelier, that the travelled path was from twenty to thirty feet wide, that in the ditch, and three feet from the outer edge of the travelled path, and about five or six feet from the fence, a hole had been dug about three feet square and two feet deep,—of which the highway surveyor had notice,—that there was nothing between the hole and the fence but an elevated sidewalk, that there was some snow upon the sides of the road, but none in the travelled path, that sleighs had been driven in the ditch and had made a path there upon the snow at the place where the hole was dug, and that the plaintiff was passing along the highway, in a dark night, with a horse and sleigh, and run into the hole, whereby his horse and sleigh were injured; and it was held, that the jury should have been instructed, that, if they found that the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or that the horse took the same direction from a natural instinct, or from inability to see the road, on account of the darkness, the town should not be held responsible for the consequences which ensued.

THIS was an action founded upon the statute,—Revised Statutes, chap. 21, sec. 26,—to recover damages for an injury occasioned by the insufficiency and want of repair of a highway. Plea, the general issue, and trial by jury, April Term, 1845,—REDFIELD, J., presiding.

On trial the plaintiff gave evidence tending to prove that in the autumn of 1842, and about eight or ten days before the happening of the injury to the plaintiff, one Roger Hubbard, for his own use and convenience, dug a hole, about three feet square and two feet deep, by the side of the highway in question,—which was in the village of Montpelier; that the hole was three feet from the outer edge of the ordinary travelled path, and about five or six feet from the fence upon the side of the road, with nothing between it and the fence but an elevated sidewalk; that there was some slight snow upon the sides of the road, but none in the middle or travelled path of the road; that sleighs had been driven in the ditch, and had made a path there, upon the snow, at the place where the injury happened; and that the plaintiff, upon a dark night in November, 1842, was passing along upon the highway with a horse and sleigh and ran into the hole, whereby his horse and sleigh were injured. The plaintiff farther gave evidence, that, previous to this accident, the highway surveyor, within the district in which this road lay, had been informed that this hole had been dug, and that it would be

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dangerous to suffer it to remain in such a place. It was conceded, that the amount of travel upon this road was large, it being one of the principal streets in the village.

The defendants gave evidence tending to prove, that the road, at the place where the accident occurred, was from twenty to thirty feet wide, and all level for travel; that for more than one hundred rods, upon the same side of the road with the hole, there was at the time a ditch, which was covered part of the way, and in which water run in the spring and fall; that the hole was entirely out of the travelled part of the road, and in the ditch; that there was ample room to pass on the snow upon the side of the road, without running into the hole; that the hole was not dangerous; and that sleighs frequently passed through it without injury.

The defendants requested the court to charge the jury, as matter of law, that if the plaintiff, in a dark night, went out of the travelled path of the road for the purpose of getting upon snow, and by so doing run into the hole and was injured, the town was not liable; that if they found, that the injury would not have happened, if the plaintiff had passed along in the ordinary path of the road, and the plaintiff, for his own comfort and convenience, left the travelled path and went upon the side of the road and into the ditch and run into the hole, and the injury happened, he cannot recover of the town.

But the court instructed the jury, that they were to judge of the sufficiency of the road, at the place where the injury occurred, with reference to the amount and kind-of travel, the season of the year, and the length of time the hole had been suffered to remain open; and that, if they considered, under all the circumstances, that the road was not reasonably safe, and that the highway surveyor was made aware of its situation before the injury, the town would be liable for any injury happening in consequence of the defect in the road, after sufficient time had elapsed to put it in repair, if the plaintiff was guilty of no want of common care and prudence in driving into it.

Verdict for plaintiff. Exceptions by defendants.

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J. A. Vail for defendants.

1. Towns ought not to be made liable for any injury received by a person who voluntarily drives out of the travelled path of a road into the ditch. If a person, for his own convenience, drives out of a perfectly level, unobstructed and sufficiently wide path of the road into the ditch, or on to the bank next to the fence, for the purpose of finding snow, the liability of the town ceases, and he must put up with the injury he receives. *Howard v. North Bridgewater*, 16 Pick. 189.

2. The charge had a tendency to mislead the jury as to the effect of the notice to the highway surveyor of the hole in the ditch. The liability of the town did not depend upon that fact. *Bardwell et al. v. Jamaica*, 15 Vt. 438. What constitutes an insufficient road and a want of common care and prudence should have been explained to the jury; for those were not altogether questions of fact. *Kelsey v. Glover*, 15 Vt. 708. *Holley v. Winooski Turnp. Co.*, 1 Aik. 74.

3. It is insisted, that it sufficiently appears in the case, that the injury was occasioned by the plaintiff's fault; and if so, he cannot recover. The jury not having been so instructed, the charge was erroneous. *Richardson v. R. & W. Turnp. Co.*, 5 Vt. 580. *Farnham v. Concord*, 2 N. H. 392.

O. H. Smith for plaintiff.

There was no evidence tending to show, that the plaintiff, for his own comfort and convenience, left the travelled path, or what would be the travelled path in the summer. The exceptions show, that the night was dark, and that the plaintiff's horse went along upon the sleigh path, and that, while so doing, the injury occurred. It is but the ordinary case of a dangerous place at the side of a road, and an injury arising therefrom, without any want of common care and prudence on the part of the person injured. There was no proof of that decisive character, which would render it the duty of the court to instruct the jury, that, as they found the fact, so would their verdict be. The case of *Kelsey v. Glover*, 15 Vt. 708, is decisive on this question. If the plaintiff was in the exercise of ordinary care and prudence, and the road was in an unsafe condition, there can be no doubt, that the plaintiff is entitled to recover.

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Allen v. Hancock, 16 Vt. 230. *Bigelow v. Weston*, 3 Pick. 267. *Cobb v. Standish*, 14 Maine 198. *Thompson v. Bridgewater*, 7 Pick. 188. *Hunt et ux. v. Pownal*, 9 Vt. 411. *Johnson v. Whitefield*, 18 Maine 286. *Jacobs v. Bangor*, 16 Maine 187.

The opinion of the court was delivered by

DAVIS, J. This action, being for damages resulting from an alleged want of repair in a highway, which the defendants were bound to keep in repair, was tried by jury; and the question before us is, whether the instructions, which the court gave to the jury, were correct, and whether the defendants were entitled to such instructions, as they requested the court to give.

It has often been determined by this court, that whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road, and entirely without fault on the part of the plaintiff, are questions of fact, ordinarily mixed, however, with questions of law,—which, of course, invite comment on the part of the court. Cases, however, not unfrequently occur, where the questions are chiefly questions of law, and in which the court, upon a given state of facts, may direct a verdict. Such are questions whether a legal highway exists, whether towns, or corporations, are bound to keep them in repair, &c. The case of *Young v. Wheelock*, 18 Vt. 493, was one of this character. The facts stated in the exceptions in this case were evidently such as not to reduce it merely to a question for the jury, whether the town was liable, or not. The injury occurred from no defect in the travelled part of the road, but from a hole dug by an individual in the ditch, three feet from the outer edge of the travelled track. The road was in the village, and was much in use, and was smooth and well made against the place of the injury, and of a width from twenty to thirty feet. This would seem to be amply sufficient in any place, in a village, or without.

The plaintiff, it appears, was passing the place in a dark night in November, with a horse and sleigh, and no obstacle existed to passing in the usual track, except want of snow. Snow existed in the ditch, and between that and the made road; and the plaintiff, for no reason apparent, except to get on to the snow, passed along in

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the ditch, and his horse run into the hole; and hence the damage occurred.

It would seem, if this verdict is sustained, that towns must not only be bound to construct good and sufficient roads, of sufficient width, and properly guarded, so as to make travelling safe against all ordinary accidents, but must also put and keep the ditches by the side of the road, usually fitted to conduct water from the road, in an equally practicable condition for travelling; so that, when any one prefers, to obtain snow, or avoid dust, or from any other reason, to travel one side of the road, rather than in it, he may do so under the same security and indemnity as those who travel in the way provided for them. This, we think, would be an unwarrantable extension of the liabilities of towns. The doctrine hitherto recognized is sufficiently liberal, and in many cases virtually makes towns insurers of travellers against ordinary accidents. It is hardly reasonable to require, in addition to the duty of making and sustaining practicable roads in the numerous places where the exigencies of the public require, that they should provide snow out of season to cover them, however convenient it may be for purposes of locomotion.

It is urged, that the case of *Kelsey v. Glover*, 15 Vt. 708, is similar to the present, and justified the reference of the whole question to the jury. In that case there was a conflict in the testimony upon the point, whether there was, or was not, a travelled track of sufficient width between the tree tops, which projected on each side. But assuming, as the court did, that this point was with the defendants, the court left it to the jury to say, whether the position of the tree tops, or one of them, contributed to change the direction of the horse running away upon the made road, and whether, in that event, their position, with the length of time in which they had been suffered to remain thus, evinced culpable negligence on the part of the town. The jury found these facts in favor of the plaintiff; and although it is evident the court were not satisfied with the result, still they did not feel at liberty to say that these questions were improperly submitted to them. Had the plaintiff in that case, without necessity, travelled out of the worked way, though wide enough, and run against the tree tops and killed his horse, it would have presented a

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case widely different from the one actually presented, and it is presumed one which would have called for a different charge.

How far towns are bound to clear away obstructions, natural, or artificial, from that portion of the highway exterior to the wrought way, how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily, or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring fields from a real or supposed necessity, or for such as may arise in attempting to pass a bridge obviously unsafe and dangerous, or in fording a stream in such case,—these and similar circumstances present mainly questions of law, calling for special instructions from the court. Cases under most of these heads have occurred and are reported in our sister states. These decisions may have been made under statute provisions different from our own. Whether so, or not, it is unnecessary to predicate any thing in advance as to their applicability to our circumstances.

The case of *Green v. Danby*, 12 Vt. 338, was not cited by the plaintiff's counsel, but perhaps may be thought to bear upon the present question. There the plaintiff diverged a mere trifle from the wrought way, in consequence of an accumulation of snow, passing where the principal travel had passed for weeks; and the question arose on the acceptance of a report of a referee. The necessity of the divergence distinguishes it from the present case, to say nothing of the slight degree of it.

In *Cobb v. Standish*, 14 Maine 198, the plaintiff recovered, where the horse was attracted, or guided, to a pool of water, by the side of the road, but partly within and partly without the limits of the highway ; and the place having a muddy bottom, the horse sunk down and perished ; the travelled road was good and the space between the road and water unobstructed. It was put by the court to the jury to say, whether leaving so deceptive and attractive an object accessible, without being guarded, evinced culpable negligence on the part of the town. These instructions were sanctioned by the supreme court. The decision seems an extraordinary one ; and although it involved a question of fact, proper to be passed upon by the jury, still I am persuaded such a case here would be regarded as one eminently calling for directions from the court. Whether,

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under proper directions, such a verdict would be likely to be rendered in our courts, I will not undertake to say. In *Johnson v. Whitefield*, 18 Maine 286, it was decided, that towns, if they suffer timber, or other deposits, to lie by the side of the travelled road, and within the highway, as laid, by which, in consequence of sudden fright, to which horses are liable, a horse and carriage were precipitated from the road on to the timber, and the carriage was broken, are responsible, although the travelled road was sufficiently wide and well made. A distinction was taken between such artificial and natural obstacles. It is unnecessary to say, whether that case would be regarded as law here. If it were, it is distinguishable from the present in the necessity, which forced the team from the road. These cases show, that a very liberal rule is established in Maine, in favor of parties injured.

In New-Hampshire a much more stringent doctrine prevails; as appears by the case of *Farnham v. Concord*, 2 N. H. 392; where the town was held not liable for an injury occasioned by an excavation by the side of the road, although the travelled way was only twelve feet wide, and another excavation existed on the opposite side, and the whole vicinity, by the side of the river, was covered by nearly two feet of water. The court thought it was no fault of the town, that the guide, even under these circumstances, conducted the plaintiff's team out of the travelled way. The rigid doctrine of this case has not, it seems, been at all modified by subsequent decisions in that state.

In Massachusetts the decisions assimilate better with the law in New-Hampshire, than that of Maine. In the case of *Howard v. North Bridgewater*, 16 Pick. 189, some large stones were, for many years, permitted to lie by the side of the road, about seven feet from the travelled track, and within the highway limits; when the plaintiff's horse, becoming frightened by the failure of some part of the waggon, to which he was attached, ran violently upon these stones and broke his leg; the town was held not responsible, although their agents had notice of the position of the stones. In a recent case, reported in 8 Metc. 388, *Tisdale v. Norton*, it was decided, that the town was not liable, where the injury occurred in attempting to pass through a pond some distance from the road, across which a deep gully, several rods wide, had been made some days before by a fresh-

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et, and which, of course, rendered it impassable. The Massachusetts statute does not vary materially from ours, except that it gives double damages in case of injury through defect or want of repair in highways, after reasonable notice.

The case cited above from the 16th of Pickering very nearly resembles the one under consideration; except that in the former the travelled part of the road was only about half as wide as in the latter; but the obstructions complained of had been in the same position about twenty years. We think the doctrine laid down in that case is the correct one. It does not militate against that of *Bigelow v. Weston*, 3 Pick. 267; where the plaintiff recovered for an injury, which occurred under similar circumstances, except that the stones had been recently placed upon the road for the purpose of re-building a bridge, and so near on the opposite sides as to leave but eleven and a half feet for travelling.

We think the jury should have been instructed, that, if they found that the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or if the horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness, the town should not be held responsible for the consequences which ensued.

The result is, the judgment of the county court is reversed.



WILLIAM GOLD, JR., v. VERMONT CENTRAL RAIL ROAD COMPANY.

The provision in the charter of the Vermont Central Rail Road Company, which authorizes a person, whose land has been taken for the use of the Company, and who feels aggrieved by the appraisal of the damages by the commissioners appointed in pursuance of the charter, to appeal to the county court, and which provides that the decision of the county court shall be final in the matter, does not entitle the person thus appealing to have his damages assessed in the county court by a jury.

The term "Court" may be construed to mean the *judges* of the court, or to include the *judges and jury*, according to the connection and the object of

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its use. Resort must be had, for the purpose of determining the form of trial, where there is no express legislative provision, other than the use of the general term, to the nature of the question submitted to the court, and the mode, heretofore in use, of determining similar questions.

In cases analogous to those where land has been taken by a rail road corporation, pursuant to the provisions of their charter, it has never been the practice in this state, where the matter has been pending in the county court, to assess the damages by a jury,—but by commissioners, or perhaps by the judges of the court.

The statute of November 2, 1846, which provides, that, when it becomes necessary to assess damages, *and no other provisions are made by law* for such assessment, the same shall be assessed by a jury upon the request of either party, does not entitle a person, whose land has been taken by the Vermont Central Rail Road Company, and who has appealed from the appraised of his damages by the commissioners appointed under the charter, to have his damages assessed by a jury in the county court;—since the general terms used in the charter of the company must be construed to have provided, that the damages, in such cases, should be assessed in the mode usual in this State in analogous cases, which is by the appointment of commissioners by the county court, or perhaps by the judges of the court,—but never by a jury.

PETITION for a writ of mandamus. The petitioner set forth, that certain of his land had been taken by the Vermont Central Rail Road Company, for the purpose of building their road; that the commissioners, appointed in pursuance of the provisions of the charter of the Company, had appraised his damages at sixty five dollars; that, feeling aggrieved by this decision, he had appealed to the county court and had filed in that court a motion in writing, to be allowed to have his damages assessed by a jury; and that the county court had refused to allow the same, but had proceeded to assess his damages by the judges of the court;—and he prayed, that a writ of mandamus might issue, directed to the county court, and commanding them to grant to him a trial by jury for the assessment of his damages.

J. L. Buck for petitioner.

1. We insist, that the constitution and laws of this state, as well as the settled practice under them, give the petitioner a right of trial by jury, unless it is taken away by the charter of the company. The

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true interpretation of the 15th Article of the Constitution is, that when any question of fact, to be decided upon the testimony of witnesses, is raised, or presented, the parties have a right to a jury trial. 3 Pet. 446. 1 D. Ch. 247. We deny, that the act of incorporation prescribes the *mode* of trial. The eighth section declares, "that the decision of the county court shall be final;"—but it is not declared, whether the trial shall be had or the damages assessed by the judges, or by the jury. It might as well be claimed, that the judges should try all civil suits; for the statute, in defining the jurisdiction of the county court, is entirely silent upon the subject of a jury. Rev. St. 160, § 7.

2. The statute of November 5, 1846, upon the subject of the appraisement of damages, is applicable to this case, and was intended by the legislature to embrace such cases. The act of incorporation does not prescribe the mode of trial; and no rights can be claimed by the company, except such as are given by its charter, or are incident to its existence. Ang. & Am. on Corp. 2. 5 Conn. 560. The forms of administering justice and the powers of courts must ever be subject to legislative enactment. *Bank of Columbia v. Okely*, 4 Wheat. 235. *Young v. Bank of Alexandria*, 4 Cranch 384. *McLaren v. Pennington*, 1 Paige 107.

L. B. Peck for defendants.

1. By the act of incorporation the damages, on an appeal, are to be determined by the court. The eighth section provides, that either party may appeal from the decision of the commissioners to the county court, "and the decision of such court shall be *final*." If the jury fix the amount of damages, the court do not pass on the question; for it will not be insisted, that the court can change the verdict. The term "county court," as here used, must mean that tribunal which is described as such in the constitution and laws of the State. The third section of chap. 25 of the Revised Statutes provides, that "there shall be, in each county, a *county court*, to consist of one chief judge," &c., "and two assistant judges, to be appointed for each county;" and when the act of incorporation provides, that the party may appeal to the "county court," and that the decision of *such* court shall be *final*, it must mean that tribunal above described, composed of a judge of the supreme court and two assistant

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judges. From the whole structure and language of this chapter it is evident, that these judges are the "county court;" p. 161, §§ 11-13; p. 164, § 36. It has been the uniform practice in this state, in all cases where damages were claimed by land owners for the location of turnpikes and common highways over their lands, to have them assessed by committees appointed by the legislature, or by some judicial tribunal. It is fair to presume, that, if the legislature had intended, in the present case, to change this practice and provide for the assessment of damages by a jury, they would have used language, which could leave no reasonable doubt of that intention. The whole legislation in this state, in reference to this subject, and those of a kindred character, shows that the whole matter has been studiously excluded from the consideration of a jury. Acts of 1794, p. 26, § 3. Acts of 1803, p. 129, § 2.

2. But the party claims, that he is entitled to a jury trial by the constitution. That article in the constitution, upon which he relies, has no application to this case. It has reference to an issue of fact, joined in a cause or proceeding known to the common law. The proceeding in this case is not known to the common law. It is a proceeding created by statute only. The case of *Huntington v. Bishop*, 5 Vt. 186, is decisive of this question. See, also, *Beekman v. Saratoga R. R. Co.*, 3 Paige 45; *Backus v. Lebanon*, 11 N. H. 19.

3. The statute of November 2, 1846, does not affect the present question. That statute applies only to those cases, where no mode for assessing damages is prescribed. The act of incorporation has made provision "for such assessment." And in any view that can be taken of this statute, the question must rest upon and be determined by the provisions of the act of incorporation. 3 Vt. 507. 2 D. Ch. 77. *Stamford v. Barre*, 1 Aik. 321. 1 N. H. 199.

The opinion of the court was delivered by

DAVIS, J. This is an application to this court by William Gold, Jr., for a writ of mandamus, to be directed to the county court for the county of Washington, setting forth, substantially, that the Vermont Central Rail Road Company have located their road through the petitioner's land in Northfield in said county, taking and appropriating for that purpose about four acres and thirteen square rods;

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that, the parties failing to agree upon the price of said land, these commissioners, duly appointed in pursuance of the act incorporating said company, assessed the petitioner's damages at the sum of \$65,—from which assessment, being aggrieved thereat, he appealed to the county court, and duly entered his appeal at the term of said court holden at Montpelier in November, 1846; that at the same term he filed a motion in writing, requesting the court to direct that his damages should be assessed by a jury, duly impanelled,—which request said court declined to grant; but, on the contrary, proceeded to assess such damages by the judges of said court, and did assess them at the sum of ——. The petitioner thereupon, believing this proceeding of the county court to be a violation of his legal rights, prefers this petition to this court,—notice of which having been duly served upon the Rail Road Company, they appear by attorney to resist the application.

Practically the question may be considered one of considerable importance; and it has undergone a full discussion at the bar, by the counsel of the respective parties. No question is made with respect to the power of this court to issue such a writ, in a case of this kind, directed to the county court, provided the ground assumed by the petitioner be correct, as to his right to insist on having his damages ascertained in that mode. We shall therefore consider the case as involving that question alone.

We are not disposed to attach any importance to the peculiar phraseology of the act of incorporation, authorizing the *county court* to decide finally upon appeal. The term "*court*" may be construed to include a jury, as well as judges and a clerk, or as used in contradistinction from a jury, according to the connection and object of its use. When the statute speaks of the county court generally, its powers and jurisdiction, it is to be understood in the former sense. When it authorizes the court, upon the agreement of parties, to try issues of fact, it is to be understood in the latter sense.

In this case nothing can be predicated, as to the sense in which the term "*court*" is to be used, from the mere language and connection. Resort must be had, for that purpose, to the nature of the question submitted to the county court, and to the mode of determining similar questions heretofore in use. If any uniform mode exists, which has been recognized since the establishment of a judi-

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ciary in the state, it will be a reasonable presumption, that, in the absence of any express provision to the contrary, the legislature intended that the same mode should continue to be pursued.

No matter precisely similar has heretofore been brought under cognizance of the courts. Rail road corporations are new bodies with us; and the taking and holding another's land *in invito*, for the purpose of constructing such roads, is a novel proceeding, now for the first time authorized by our laws. Easements for the use of turnpike corporations, and for common roads, have, however, long been established, upon a compensation rendered; and the mode of ascertaining the compensation to be paid in such cases would seem, from the close analogy in the subjects, the proper one to be applied here. What, then, has been that mode? By commissioners, by committee-men, by appraisers, and perhaps by the county court judges,—but never by a jury. It has not been hitherto supposed, that it was a subject coming within the scope of the appropriate duties of a traverse jury. The issue to be tried, if it can, with any propriety, be called such, is altogether unlike that presented by the counter allegations between party and party, in which the truth of the facts in controversy is to be ascertained. The duty imposed is rather one of appraisement merely. As such, it appropriately belongs to one man, or a board of competent men, qualified properly to discharge it.

This view of the subject necessarily leads us to the conclusion, that the legislature, in transferring to the county court, upon the dissatisfaction of either party at the decision of the commissioners, the appraisement of damages in cases under this act, intended that the question should be tried without the intervention of a jury. If any innovation had been intended, it would doubtless have been indicated in express terms.

A similar view was taken by the supreme court of New Hampshire, in *Backus v. Lebanon*, 11 N. H. 20, in which case a turnpike corporation claimed to have the damages, occasioned by an appropriation of a portion of their road to the purposes of a free road, assessed by a jury. Chief Justice PARKER, in denying the application, observed, "that, by a long course of legislation, the damages occasioned by the laying out of highways were to be assessed by the court, or by a committee; and no provision is found

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for the intervention of a jury in cases of that character." The same remark is equally applicable to our own legislation.

On similar grounds the chancellor of New York, in *Beekman v. S. R. R. Co.*, 3 Paige 45, determined, that a legislative provision for the ascertainment of damages, on laying a rail road by a committee was not an infringement of the right of trial by jury, guaranteed by the constitution.

The case under consideration is, in fact, in another particular, stronger than the ordinary one of laying out highways. Here the fee of the land is taken and paid for,—whether with a reversionary right to the former proprietor, on the extinguishment of the corporation, it is not necessary now to consider; and the question is simply one involving an appraisement of the value of the land,—taking into view, indeed, the uses to which it is to be applied. It was competent for the legislature to provide, that this revision of the primary appraisement should be made by the county court judges, or supreme court judges, or by a jury, or by another board of commissioners. No doubt the tendency of our legislation is in favor of extending the scope of the duties of traverse juries. County courts have been invested with a discretionary power to grant jury trials in trustee proceedings; and such mode of trial is now, in some cases, made imperative, on the request of either party, when before it was matter of discretion. A similar tendency may be discovered in the legislation of the general government, in a provision contained in the late bankrupt act, authorizing jury trials in certain cases under the act.

It only remains to be considered, whether the statute of November 2, 1846, can be considered as in any manner affecting this question. We are all agreed, that it does not. It simply provides, that in any *case* then pending, or which might afterwards occur, when it should become necessary to assess damages, *when no other provisions by law are made* for such assessment, the same shall be assessed by a jury, on the request of either party. Now, not to place any stress upon the word *case*, as here used,—for perhaps that term may as well comprehend this proceeding, as an ordinary common law suit,—and in common parlance it has a more extended meaning than the word *suit*, or *action*, and may include application for divorce, applications for the establishment of high ways,

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applications for orders of support of relatives, and other special proceedings unknown to the common law,—yet if the views already expressed are well founded, there was no absence of provision by law for the assessment of damages in this case, already provided. The act of incorporation expressly provides it, in requiring the county court to perform that duty,—construing the language of the act, as we have done, to require it to be done in those modes only heretofore known and practiced.

The result is, the application for a mandamus must be denied, with costs.

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**AMPLIUS BLAKE AND HIRAM C. MCINTYRE v. JOHN B. LANGDON
AND MOSES L. HART.**

IN CHANCERY.

The general rule, in equity as well as at law, is, that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record, only, will be regarded, a court of equity will, in a case of insolvency, regard the real parties,—those ultimately to be affected by the decree,—and allow a set-off of demands in reality mutual, although prosecuted in the name of other persons, nominally interested.

Courts of equity exercised a jurisdiction over the subject of set-off previous to the enactment of the statutes upon that subject; and their jurisdiction does not in any manner depend upon those statutes.

In this case, B. and H. were partners, B. furnishing the capital stock, and it was agreed between them, that B. should continue to furnish a certain amount of capital, and that, in lieu of interest and profits, H. should pay him a specified sum each year during the continuance of the partnership. Subsequently B. and M. formed a co-partnership in the same business, and became the successors of B. & H., the firm of B. & H. continuing only for the purpose of closing the former business; and M., who was the active partner, paid from time to time, at the request of H., with the property of

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B. & M., debts due from the former firm, and charged the same to B. & H. upon the books of B. & M., and also received a note from H. signed with the name of the former firm, and also, for the purpose of paying a note due from a third person to B. & H., executed a negotiable promissory note to H. alone. This note was afterwards put in suit in the name of an indorsee, before the repeal of the statute allowing the maker of a negotiable note to have the benefit, as against the indorsee, of all legal and equitable defences to the note. And it was held, upon a bill in chancery brought by B. and M. against H. and the indorsee of the last named note, that the account charged upon the books of B. & M. to B. & H. and the note held by B. & M. signed with the firm name of B. & H., must be set off against the note executed by B. & M. to H. and sued in the name of the indorsee, —it appearing that H. had become insolvent.

And it was also held, that if H., in such case, would seek to avoid the contract entered into between himself and B., he must file his cross bill, setting forth the grounds upon which he claimed relief.

APPEAL from the court of chancery. The orators alleged, in their bill, that a copartnership formerly existed, at Middlesex, between the orator Blake and the defendant Hart, Blake furnishing the capital stock and Hart being the active partner; that while they were thus doing business Blake executed a contract in writing, at the request of Hart, in these words;—“Boston, November 25, 1830. ‘This certifies, that I have agreed with Moses L. Hart to let him ‘have all the profits of the business of Blake & Hart at Middlesex, ‘and by his paying me \$950,00 each year, the time to begin in ‘September, 1829; and \$40 of said first sum to be paid in good ‘spruce shingles yearly, at \$1,00 per thousand, at Middlesex; and ‘to let him have a capital of \$3333.33, free of interest, to continue ‘at that rate so long as we continue in business together;—to ‘pay \$500,00 of said \$950,00 annually, and interest on the re-‘mainder;’”—that the business continued under this contract until October 17, 1831, when Blake and Hart mutually executed a contract, which, so far as it related to the business at Middlesex, was in these words;—“The said Hart agrees to give the said Blake \$960,00 a year for his part of the profits of the store at Mid-‘dlesex, and said Blake is not to have interest on the goods left ‘by him in the store to the amount of \$3000, and what other ‘property said Blake has, that Hart has the care of, that is draw-‘ing rent, or interest, said Blake is to have the same;”—that

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about the 27th of September, 1834, Blake and Hart settled their accounts as partners, in which Blake charged Hart with two years' and seven months' profits, at \$950,00 a year, which was allowed by Hart, and there was found due from Hart to Blake a balance of \$333,25, for which Hart gave his note, which still remained unpaid; that in the spring of 1832 the orator McIntyre purchased of Blake the goods in the store then occupied by Blake & Hart, and Blake & McIntyre formed a co-partnership, and carried on business in the store previously occupied by Blake & Hart,—McIntyre being the active partner, and Blake residing at Chelsea; that subsequently McIntyre, at the request of Hart, paid, from the property of Blake & McIntyre, various debts due from the firm of Blake & Hart, and which were contracted between September, 1830, and September, 1834, and charged the same to Blake & Hart upon the books of Blake & McIntyre,—McIntyre then having no knowledge of the agreements of November, 1830, and October, 1831, between Blake and Hart, and Blake having no knowledge, at the time, of the advances made by McIntyre to Hart on account of the debts of Blake & Hart; that on the 17th day of June, 1833, Hart, for the firm of Blake & Hart, gave a note, signed with the firm name, to Blake & McIntyre, for \$68,75; that about the 8th of February, 1834, one Parker, being indebted to Blake & Hart, desired the orators to pay the same, and thereupon the orators executed their note, signed by McIntyre with the firm name, for the amount, and made the same, at Hart's request, payable to him, or his order, on demand with interest.—Hart then agreeing, that whatever account the orators had against him, or against the firm of Blake & Hart, should be allowed upon that note; that afterwards Hart endorsed this note to the defendant Langdon, who commenced a suit thereon, returnable to the Washington county court, November Term, 1839; that the orators filed a declaration in offset upon book account against Hart, and an auditor was appointed thereon, who reported the balance due to the orators, including the sums advanced by them on account of Blake & Hart, to be \$184,10; that that sum was allowed by the county court as an offset to the note, and exceptions were taken by Langdon, and the case passed to the supreme court, where it was still pending; and that Hart had become wholly insolvent. And the orators prayed, that Langdon might be perpetually enjoined from prosecuting his

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action upon the note, and that a sum, due from Hart to the orators, sufficient to pay that note might be offset thereto, and for general relief.

The defendant Hart answered, admitting substantially the facts alleged in the bill, except that he denied that he entered willingly into the agreements of Nov. 30, 1830, and Oct. 17, 1831, or that the note executed by Blake & McIntyre for the debt of Parker was made payable to him at his special request, or that he then agreed, that whatever Blake & McIntyre had against him, or against Blake & Hart, should be allowed upon that note, or that the advances made by McIntyre on account of the firm of Blake & Hart were made without the knowledge of Blake; and he alleged, that he had received from Langdon a full consideration for the note endorsed to him, and that he had delivered to Blake, and to Blake & McIntyre, collectable demands sufficient to pay whatever claims they might have against him. He also admitted, that he had become poor and unable to pay his debts.

The defendant Langdon answered, alleging that he purchased of Hart the note against Blake & McIntyre, in 1834, for a full consideration, being ignorant that Blake & McIntyre had any offset or defence to the note; that he immediately gave notice to Blake & McIntyre, that he had become the owner of the note; that the note was payable in one year from date; and that he had no knowledge as to any of the other matters alleged in the bill.

The answers were traversed, and testimony was taken, proving that notice was given by Langdon to Blake & McIntyre, in the summer of 1834, as alleged in his answer. It appeared, that the note endorsed to Langdon was made payable in one year from the first of April, 1834. The case was heard upon this testimony and the bill and answers.

- The master, to whom the matter was referred, reported, that there was due upon the note endorsed to Langdon \$270,49, and that the note of June 17, 1833, executed by Hart, in the name of Blake & Hart, to the orators, and the balance of the account, reported due to the orators by the auditor in the action upon the note, amounted in the whole to the sum of \$331,03.

The court of chancery,—REDFIELD, Ch.,—decreed, that \$270,49 of the last mentioned sum be set off in payment of the note endor-

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ed to Langdon, and that Langdon be perpetually enjoined from prosecuting his action upon the note, and that Hart pay the balance of said sum of \$331.03 to the orators in sixty days. From this decree the defendants appealed.

L. B. Peck for orators.

1. The *insolvency* of Hart is a sufficient ground for the court to exercise its equitable jurisdiction in allowing an equitable set off. *Lindsay v. Jackson*, 2 Paige 581. *Simpson v. Hart*, 14 Johns. 63. *Pond v. Smith et al.*, 4 Conn. 297. *Keed v. Bank of Newburgh*, 1 Paige 215.

2. The accounts, which the orators claim to offset, are in fact, though not in form, due from Hart alone. Blake, it is apparent, was not a partner with Hart, as between themselves; but he was such, as to third persons. In this point of view the case falls directly within the principle adopted by this court. *Ferris v. Burton*, 1 Vt. 439. *Fuller et al. v. Roe et al.*, Peake's Cas. 197. *Stacy et al. v. Decy*, 2 Esp. R. 469. *Winch v. Keeley*, 1 T. R. 619.

3. The orators' right of set-off is not affected by the transfer of the note to Langdon, as he took it subject to all the equities that existed against it at the time of transfer. *Clute v. Robison*, 2 Johns. 593; 13 Johns. 9. *O'Callaghan v. Sawyer*, 5 Johns. 116. *Bank of Niagara v. McCracken*, 18 Johns. 343. *Ford v. Stuart*, 19 Johns. 342. *Hatch v. Greene*, 12 Mass. 195. *Jones v. Witter*, 13 Mass. 304. *Shapley v. Bellows*, 4 N. H. 347. *Sargent v. Southgate*, 5 Pick. 312. *Adams v. Bliss*, 16 Vt. 39.

O. H. Smith for defendants.

It appears, that there was no dissolution of the firm of Blake & Hart, until long after the account accrued between that firm and Blake & McIntyre. The firm of Blake & McIntyre have treated the dealings in question as a partnership business with Blake & Hart, according to the truth of the case. The writings dated Nov. 25, 1830, and Oct. 17, 1831, amount to a warranty, that Blake's share of the profit shall amount to \$960.00 per year, and provide that Blake shall furnish about \$3000 capital, without interest. These contracts were unconscionable and usurious, and ought not to be enforced. It is believed, that no case, or principle, can be found,

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that will warrant a recovery in this case. Newl. on Cont. 365. 2 Sw. Dig. 60. 1 Story's Eq. §§ 188, 239, 244. *McDonald v. Nelson*, 2 Cow. 139. It is well settled, that joint debts cannot be set off against separate debts, nor separate debts against joint debts, either at law, or in equity. 2 Sumn. 409. 3 Mason 145. 5 Ib. 206, 213. The statute upon the subject of offsets merely applies to mutual debts. Sl. St. 144. It clearly appears, that McIntyre did not rely upon the note given by Blake & McIntyre to Hart as a mutual credit, on which he based his account, or the note for \$68,75. The known rule in courts of equity is, that they follow the law in matters of set-off, unless there is some natural intervening equity, going beyond the statutes of set-off, which constitutes the general basis of set-off at law. Such a natural equity does arise, when there are mutual credits between the parties, or when there is an existing debt on one side, which constitutes the ground of a credit on the other side, or when there is an express or implied understanding, that the mutual debts shall be a satisfaction, or set-off, *pro tanto* between the parties. 2 Sumn. 412. 2 Story's Eq. Jur., §§ 1435-7. It was the latter of these rules, upon which the decision was predicated in *Ferris v. Harton*, 1 Vt. 439. Mere insolvency is no substantial ground of relief; and more especially that accruing long after an assignment of a demand to a *bona fide* holder. The private agreement between Blake and Hart, if it were not unconscionable, could not bind third persons, who were strangers to it. The note was negotiated, in the regular course of business, before it became due; and it is to be presumed, that the money paid by Langdon was used for the benefit of the firm;—but if Hart has committed a fraud, the loss, as between Blake and Langdon, must fall on Blake. Story on Part. 161.

The opinion of the court was delivered by
REDFIELD, J. This is a case where there has been considerable controversy, whether the court should regard the contract, or contracts, between Blake and Hart, under which they carried on their business, as so far binding, in equity, as to form the proper basis upon which to decree a set-off in the present case.

1. Without going at all into the nature of that contract,—which seems to have been understandingly made and voluntarily executed

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upon both sides,—it will be sufficient, for the present purpose, to say, that the nature and binding force of that contract is not in issue in the present case. If Hart wished to be relieved from the effect of that contract, he should have filed his cross bill, stating the grounds upon which he claimed the relief, and thus had the accounts properly settled between the partners, if there should appear to be any just cause for the court of chancery to interfere in the matter. But to ask the court to thus take a leap in the dark, and declare the contract *unconscionable, unequal and oppressive* upon the mere inspection of the contract, is certainly not warranted by the precedents of proceedings in equity. Had the case been illegal upon the face of it, *possibly* the subject might merit a different consideration. But it is to be considered, that it is not every *inequality* in a contract, which will justify a court of equity in setting it aside,—because that would require them to set aside almost all contracts, in these speculating times; and that, for any thing we can positively know, this contract *might* not have been unequal, (although we make no doubt it was,) for it is *possible*, that the profits might even have exceeded those which were insured by Hart. But at all events we now know no more upon that subject, than Hart knew at the time he entered into the contract; and should we proceed in a summary manner to set it aside, it must be upon the ground, that Hart should have had more circumspection, than to have entered into it; for there does not appear in proof any stress of circumstances, even, by which he was driven into the contract.

2. We do not see how Langdon can stand in any better position than Hart; for this being executed, and all the rights accrued, before the repeal of the proviso of the old statute in regard to promissory notes, all equitable defences, as well as those at law, are expressly reserved to the makers of the note.

3. The only remaining question is, whether the orators have made out a proper case for the interference of this court. Upon this point we need only refer to the case of *Downer v. Dana et al.*, 17 Vt. 518. That case is an authority, to the full extent, for the present. The debts here, as well as there, are substantially mutual, unless we regard the rights of McIntyre as defeating the mutuality,—which need not be taken into the account, as he, himself, asks for

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the set-off. The note, then, was due to Hart and from Blake and McIntyre. The account was due from Hart,—that is, it was *ultimately his debt to pay*;—so also, of the other notes. The case of *Ferris v. Burton*, 1 Vt. 439, is, also, a full authority for this decision.

The only difficulty, which this case has ever seemed to present, has arisen from the repeated declarations of judges and elementary writers, that, in regard to set-off, *courts of equity follow the same rules as courts of law*, and no more in the one case, than the other, can *joint and separate debts be set-off against each other*. To prevent future misapprehension and the necessity of going over this whole ground at every successive application of this kind, it may be proper to examine this subject somewhat more at length, than would otherwise seem necessary.

1. It is, I suppose, admitted on all hands, that courts of equity did exercise a jurisdiction upon this subject, before the statutes of set-off existed; and consequently the jurisdiction is not based upon any statutes of set-off, and would exist as well without any such statutes as it now does, and would not be in any sense affected by the repeal of those statutes. *Ex parte Stephens*, 11 Ves. 24. *Ex parte Blagden*, 19 Ves. 465. *Hawkins v. Freeman*, 2 Eq. Cas. Abr. 10, pl. 10.

2. The writers upon English law seem to admit,—and that seems to be the sound reason, resulting from inference and presumption,—that the English statutes of set-off, the 2d of Geo. II and 5th of Geo. II, in relation to bankrupts, and some subsequent statutes, were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides. 14 Petersd. Ab. (417) 301, and note. The general statute of set-off of 2 Geo. II is restricted to *mutual debts*; while that in regard to bankrupts extends to *mutual credits*. In regard to the latter statute, the administration of which is almost altogether under the supervision of the court of chancery, they have exercised both an equitable and legal jurisdiction. That we will examine.

3. If the court of chancery in England continued to exercise any jurisdiction, in regard to this subject, after the passing of the statute, it is reasonable to suppose they would only interfere in those cases,

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which did not properly come within the powers of the courts of law. How much they would go beyond the limits, which courts of law had prescribed for themselves, would, as in other cases, depend upon their own discretion; and this discretion would, as in other cases, also depend a good deal upon the special circumstances of particular cases. Such, upon examination, we find to be the fact in regard to the set-off which the English chancery has allowed in bankrupt cases.

At law, it is well understood, the parties upon the record, only, will be regarded in allowing a set-off; and the *nominal* parties must, consequently, be the *same*. But equity regards the real parties,—the parties ultimately to be affected by the decree. In the case of *Ex parte Quinten*, 3 Ves. 248, it seems to me the court go farther, than what a proper regard to the embarrassments attending similar inquiries in many cases would require or justify. But the case was evidently decided upon its particular equity. In that case a debt was actually divided, and a portion of it set off, according to the equitable rights of the parties. That is farther than courts of equity have often gone, I admit; but I confess, that, under similar circumstances, I should be inclined to adopt the reasoning of Lord Loughborough in this case. He goes upon the ground, that “The *right* is manifest, the *equity* is a *clear* and a *strong* one.” Courts of equity interfere, in cases of set-off, upon analogous grounds to those upon which their whole *preventive jurisdiction* is based,—that is, to *prevent irremediable injustice*. It is upon this ground, that one will be restrained by injunction from doing mischief to mines, shade trees, monuments, and in many such like cases, where compensation in damages is no *adequate remedy*. So, too, when one is pursuing an action at law, against which he has himself given a bond of indemnity, he will, to prevent circuity of action, be restrained by injunction.

It is upon these grounds, that I think, when the debts are *in reality mutual*, or to that extent, even, when the debt must be apportioned, and the party, attempting to enforce his claims at law in the name of some other party *but nominally interested*, is himself *insolvent* a, court of equity should and will interfere to prevent the injustice by decreeing the set-off. Such, as I understand, is the uniform

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course under the English bankrupt laws;—which are not broader than the statutes of set-off in this state.

The case of *James v. Kynnier*, 5 Ves. 108, is a full authority to the very point for which I contend. There was no pretence here, that there was any mutuality in the debts *at law*. Upon the most favorable view, it was setting off a separate debt against a joint debt, Lord Loughborough says, “I have not a particle of doubt upon this case, which is the clearest I ever heard.” The only equity, upon which the case rested, was, that the debts were in *reality* mutual and *an intervening insolvency*. *Ex parte Stephens*, 11 Ves. 24, is clearly a case of *equitable* set-off, “*where there could be none at law*,” as is said in the marginal note to the case. The note appended to the case of *James v. Kynnier* in Summer’s edition of Vesey, states the rule upon this subject very fairly;—“The doctrine of set-off, under the statute, must be the same *at law* as in equity; but the equitable jurisdiction on this subject prevailed long before the statute of Geo. II. And this difference seems established, namely, that a set-off, *at law*, must be founded on a strict case of mutual debt, or mutual credit; *but that a more extended construction may be made in equity*.” *Ex parte Blanden*, 19 Ves. 467. *Ex parte Flint*, 1 Swanst. 34. *Taylor v. Okey*, 13 Ves. 181. The case of *Hanson ex parte*, 12 Ves. 345-6, is the very case of setting off a separate debt against a joint debt, and upon equitable grounds merely.

The general rule undoubtedly is, in equity as well as at law, that joint and separate debts cannot be set-off against each other. Such is the language of all the cases and of all the writers upon the subject. But they almost all allow of a sweeping exception, and nearly in the same words,—“*under particular circumstances*;” *Ld. ELDON*, in 3 Meriv. 618, quoted with approbation by Chancellor KENT in *Dale v. Cooke*, 4 Johns. Ch. R. 13; Story on Part., § 395; 2 Story’s Eq. Jur., § 1432 *et seq.* The difficulty of *defining* these circumstances is hinted at by Justice Story, § 1437, thus,—“These are so various as to admit of no comprehensive enumeration.” These inquiries might be pursued very much farther. But when it is remembered, that, in almost all the cases where courts of equity have interfered to go beyond the statutes of set-off, it has been where there had intervened the insolvency of one or more of the parties, and that these

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are almost the only cases where the interference is of any importance, and that the cases thus far furnish no other ground for interfering, it is made sufficiently obvious, that these peculiar circumstances do not ordinarily occur, except in cases of insolvency. But beyond this, courts of equity have not generally gone.

But in looking into the subject of set-off, or *compensation*, as it existed in the civil law, where, upon suit being brought, all matters in dispute between the parties were to be adjusted, as much as in the case of a general submission to arbitrators,—I mean all matters of contract, whether liquidated or not, can we consider this, and how beneficial such a course would be to the parties, at least, one cannot but wonder at the great circumspection and reserve made use of in courts of equity upon this subject. The remarks of Mr. Justice Story, in 2 Eq. Jur. p. 88, § 1444, are just and forcible;—“The general equity and reasonableness of the maximes, upon which the Roman superstructure is founded, make it a matter of regret, that they have not been transferred, to their full extent, into our system of equity jurisprudence.”

Enough has been said, I trust, to show that the present case comes clearly within the principles of equity, upon which this branch of equity law rests, and also far within the range of the decided cases, and to satisfy all, that courts of equity need not feel over-solicitous to restrict this portion of their remedial jurisdiction, which is so just and salutary in its operation, and so impossible of being abused, and which so universally obtains in all countries, whose jurisprudence is founded upon the Roman civil law.

Decree of the chancellor affirmed.

Day v. Cummings.

IRA DAY v AVERY CUMMINGS.**IN CHANCERY.**

A nominal party to a contract, who has assigned all his interest, is only required to be joined in any proceeding in equity, in regard to the contract, for the purpose of having the decree conclude his rights, and thus conclude all future litigation. So that, in all such cases, when the court of chancery can see, in the particular case, that there exists no necessity for the joinder of such party on that account, it will not be required,—especially after the case has gone to a hearing.

A nominal party to a contract, in regard to which a suit in equity is pending, who is so divested of all interest as not to be a necessary party to the bill, is a competent witness in the case.

Where usury has been paid upon a note, in pursuance of a contract made at the time of its execution, and the payee seeks afterwards to enforce the collection of the note by a suit at law, a court of equity, upon a bill brought by the maker of the note, will order that the sum so paid be allowed as a payment upon the note, computing simple interest.

But where usury has been paid upon notes, which have been subsequently put in suit, and judgments have been recovered upon them and satisfied in full, which judgments still remain unreversed, a court of equity will not interfere to relieve the party making such usurious payments.

Any defence, which might be interposed at law to defeat a recovery upon a contract, or a portion of it, must be so interposed, or it is concluded by the judgment.

It is in accordance with the usual equity practice, when a party seeks, in a court of chancery, to obtain relief against a portion of the amount due upon a contract attempted to be enforced against him at law, and is successful, to have the entire case finished in the court of chancery, so as to put an end to any further litigation between the parties in reference to the entire contract;—although there are many exceptions to this practice.

Where the orator alleged in his bill, that a former firm, of which he was a member, and of which he was now the sole representative in interest, had made payments to the defendant of usurious interest upon notes which the defendant was now seeking to enforce against the firm by a suit at law, and also alleged that he had himself paid usurious interest to the defendant upon a note given by him to the defendant in the course of his individual business, which note he had subsequently paid in full, and prayed that he might be allowed for the pay-

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ments so made, and the bill was not demurred to, nor objected to, in the court below, on the ground of multifariousness, it was held, that relief should be afforded the orator for all the payments so made, although, in strictness, it was involving distinct matters in the same bill.

In this case the orator was allowed his costs, having prevailed upon all the points litigated, excepting those from which he was precluded by a mere technical bar really shutting out the true equity of the case.

APPEAL from the court of chancery. The orator alleged in his bill, in substance, that from 1828 until 1842 he was a partner in business at Montpelier with Luther Cross; that in 1842 he purchased the interest of Cross in the property of the firm, and executed to him a bond, conditioned that he should pay all debts due from the firm; that during the continuance of the partnership the firm borrowed various sums of money of the defendant, for which they gave him their note, and for which they agreed to pay him interest annually at the rate of twelve *per cent.*; that towards such usurious interest they paid the defendant various sums of money, and gave him several notes, which notes the defendant had put in suit, and obtained judgments thereon, which had been fully paid and satisfied by the orator; that the defendant still held two notes, one for \$400,00, and the other for \$200,00, given by the firm during the existence of the partnership, upon which the firm had made various payments of usurious interest, and the collection of which notes the defendant was seeking to enforce by a suit at law, now pending in court; that the orator had also, in the course of his individual business, executed to the defendant his own note, signed by Cross as surety, for \$125,00, for a pair of oxen, upon which he agreed to pay the defendant interest annually, at the rate of twelve *per cent.*; and that he had paid this last note in full, including a large amount of usurious interest upon the same. And the orator prayed, that an account might be taken of the amount of usurious interest paid by him, or by the partnership, to the defendant, and that the defendant might be ordered to repay the same to the orator, or to allow the same upon the notes in suit, and for an injunction, and for general relief.

The defendant answered, denying that the firm ever agreed to pay him usurious interest, or that he ever received usurious interest

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from them; but admitting that he had received from the orator, upon the note for \$125,00, a small sum above the interest at the rate of six *per cent.*

The answer was traversed and testimony was taken. Luther Cross was examined as a witness on the part of the orator; and his testimony tended to sustain the allegations in the bill. It appeared that the writ, in the action at law upon the notes, in favor of the defendant, had been served by attaching the property of the orator; and that the orator had deposited with Cross \$800,00 in money, for the purpose of fully indemnifying him against any judgment which might be recovered against him in that suit. The defendant filed a motion to suppress the testimony of Cross. Other testimony was taken, the substance of which is sufficiently detailed in the opinion of the court.

It was referred to a master, to ascertain and report the sums paid to the defendant by Day and Cross as usurious interest upon the two notes in suit, and upon all other notes executed to him by the firm, excepting those notes upon which the defendant had recovered judgments. The master reported, that the amount of usurious interest paid to the defendant previous to the date of the note for \$400, excepting the payments upon the notes which had passed into judgments, was \$57,78; and that there was paid on the note for \$400, as usurious interest, September 1, 1838, \$24,00,—November 7, 1839, \$24,27,—and September 1, 1840, \$24,00.

The court of chancery,—REDFIELD, Ch.—decreed, that the sum of \$57,78 be applied upon the note for \$400,00, as a payment at its date, that \$24,00 be applied upon said note, as a payment made September 1, 1838,—\$24,27 as a payment made November 27, 1839,—and \$24,00 as a payment made September 1, 1840; that the claims of the orator for payments made upon the notes which had passed into judgments, and upon the note for \$125,00, signed by the orator, and by Cross as surety, should be disallowed; and that no costs should be allowed to either party. From this decree the defendant appealed.

J. A. Vail and L. B. Peck for orator.

O. H. Smith for defendant.

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The opinion of the court was delivered by

REDFIELD, J. In this case the orator seeks relief, in regard to notes in suit, at law, against himself and Luther Cross, who was his partner at the time the notes were given, but who has since assigned all his interest to the orator, and taken a bond to indemnify himself against all debts, and subsequently received a deposit of money amply sufficient to cover all damages and costs, which may by any possibility ever be recovered upon the notes. The bill alleges, that the notes were given for money borrowed upon usurious interest, and that upon those notes, and some others set forth in the bill, a large amount of usury had been paid.

1. It is objected, that Cross is a necessary party to this bill. I have no doubt he might, with perfect propriety, have joined as a co-plaintiff, upon the ground, merely, of being a party to the suit at law, and so legally interested, *prima facie*, to defeat the suit. This, in general, is necessary, in order to put a *quietus* upon the litigation. But courts of equity always exercise a discretion in regard to these *formal* parties, who are not in fact interested in the *event* of the litigation, and upon whom the decree is not intended to operate, by way of requiring them to do any *positive* act. Story's Eq. Pl. 147, § 153. 1 Daniels' Ch. Pr. 248, and note. At all events, a nominal party to the contract, who has assigned all his interest, is only required to be joined in any proceeding in equity, in regard to the contract, for the purpose of having the decree conclude *his rights*, and thus conclude all *future litigation*. So that, in all such cases, when the court of chancery can see, in the particular case, that there exists no necessity for the joinder of such party on that account, it will not be required,—especially after the case has gone to a hearing. And where the testimony of the assignor is taken, disclaiming all interest, as in the present case, the assignor will be concluded by such admission upon the record, and so by the decree passed in faith of that admission. This was expressly decided in *McConnell v. McConnell*, 11 Vt. 290.

2. There is no pretence that Cross, at the time of the hearing, had any interest in the subject matter of this suit. If not a necessary party plaintiff then, he was a competent witness. And the testimony very clearly establishes the fact of the payment of usury, *in*

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pursuance of a contract made at the time of the loan. His testimony, too, is so far corroborated by the circumstances of the case, the *memoranda* upon the notes, and especially the *form* of the denial in the answer,—denominating the sums allowed, as “*discounts*,” and not as extra interest,—that we have no doubt it is sufficient to overcome the answer. The only difficulty we have found in this case has been in regard to the claims of the orator, which were disallowed by the court of chancery.

3. There was usury paid upon a note for one hundred dollars, which was indorsed down to fifty dollars. This note was subsequently sued, and went into judgment, and was paid upon the execution which issued. But the interest seems to have been paid by giving other notes, some payable to Cummings and one to another person; and these notes have also been sued and collected in the same way. All payments, which were ultimately made upon judgments and executions, were disallowed in the court below, as not being recoverable in any suit whatever, so long as these judgments remained in force. We are finally of opinion, that the judgment, or decree, was correct, in excluding these payments.

It has always been held, that any defence, which might be interposed at law to defeat the recovery, or a portion of it, must be so interposed, or it is concluded by the judgment;—and, at all events, that when the specific money, sought to be recovered back, was finally paid upon a judgment, the recovery cannot be had. *Thatcher v. Gammon*, 12 Mass. 268. *Steward v. Downer*, 8 Vt. 320. And the same principle is implied in all those decisions, where a warrant of attorney to confess judgment, and judgments confessed, upon usurious contracts, have been set aside upon that ground, or execution stayed, until that fact could be determined upon a feigned issue. That is the practice of the courts of law, in regard to all judgments entered upon warrants of attorney. *Richmond v. Roberts*, 7 Johns. 319. *Cooke v. Jones*, Cwp. 727. *Everitt v. Knapp*, 6 Johns. 331. *Duncan v. Thomas*, Dougl. 196. In this case no judgment had been confessed, under the warrant. BULLER, J., said, the “court had the same jurisdiction, as if the judgment had actually been entered up.” See, also, *Starr v. Schuyler*, 3 Johns. 139, and note.

4. Many questions in regard to the *time* of the payment of usury,

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under the English statute, have arisen, which have a more or less direct bearing upon this question of the effect of a judgment upon the original contract,—but none of them, perhaps, directly affecting the question raised in this case. They will be referred to in the subsequent case of *Grow v. Albee*, in Orleans county, reported in this volume. The case of *Fanning v. Dunham*, 5 Johns. Ch. R. 122, which is relied upon by the plaintiff's counsel as most in point, as justifying this court in allowing the orator to recover the usury paid in pursuance of the several judgments, shows very fully the history of the decisions at common law upon this subject, and is here referred to for that purpose. But the case is not in point, to justify relief in the present case;—for 1st, The bill, in that case, was brought expressly for *setting aside the judgment*;—and 2d, The judgments were mere confessions, under warrants of attorney, such as we have seen are always relieved against at common law, even.

5. But the very full examination, which we have given this case, has induced us to recommend to the chancellor of this circuit to modify his decree in some respects, for the purpose of reaching the more perfect equity of this case, as it seems to us.

1. We think it more in accordance with the usual equity practice, that the case should be *finished* in the court of chancery;—although there are many exceptions to this practice.

2. As the bill is not demurred to, or objected to, as we understand, in the court below, on the ground of *multifariousness*, we think it best that the orator should have relief in regard to whatever usury was paid upon the note for the oxen;—which, in the greatest strictness, might be liable to the objection of involving distinct matters in the same bill, but which may well be included in this decree, when modified as above recommended.

3. As the orator has really prevailed upon all the points litigated, but for the judgments at law, which is a mere technical bar and really shuts out the true equity of the case, we recommend the chancellor to allow the orator his costs in the court of chancery. In this court he will be entitled to them, as matter of right.

The decree of the chancellor is reversed, and the case remanded, to be proceeded with according to the foregoing recommendation,—that is, that, upon computing all sums of usury, upon all the demands

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named in the orator's bill, which sums were not *ultimately paid upon judgments*, and the costs in the suit in chancery, on the part of the orator, in that court and in this, the amount be set against the sum of the defendant's claim in the suit at law, including his costs in the court of law to the time of the decree; and, if the balance is in favor of the defendant, he be decreed, upon the payment of the same, to surrender the note, or notes, in suit, to be cancelled, and, if in favor of the orator, he have a decree for the same, and execution after sixty days.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA.
APRIL TERM, 1847.

PRESENT,
Hon. ISAAC F. REDFIELD,
Hon. MILO L. BENNETT,
Hon. DANIEL KELLOGG,
Hon. CHARLES DAVIS, } ASSISTANT JUDGES.

JAMES MULLEN v. JAMES GILKINSON, 2d.

{ It is well settled by repeated adjudications in this state, that if a party, under a contract to labor for a specified period, leave the service of the party with whom he contracted, before the expiration of the time and without sufficient cause, he cannot sustain an action thereon.

It is no sufficient cause for abandoning such contract, that the party was employed, with his own consent, upon work not contemplated at the time the contract was made.

Nor that the person making such contract had difficulty with another person in the service of his employer, and his employer refused, upon his solicitation, to discharge such other person.

Book ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows.

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The plaintiff's account was for about three months' labor, which was performed for the defendant under a contract that he would labor for him seven months, at eleven dollars a month. It appeared that the defendant, not having sufficient work upon his farm to keep the plaintiff busy, employed him, with his consent, in ditching for other people and received the pay therefor himself. It also appeared, that the plaintiff had some difficulty with another person, also in the service of the defendant, and solicited the defendant to discharge such person, and that, upon the defendant's declining to do so, the plaintiff abandoned the service of the defendant and commenced this action to recover for the labor which he had performed under the contract.

The county court rendered judgment upon the report in favor of the defendant. Exceptions by plaintiff.

J. D. Stoddard for plaintiff.

— — — for defendant.

The opinion of the court was delivered by KELLOGG, J. This was a suit to recover for the personal services of the plaintiff. Upon the facts detailed in the auditor's report, the county court rendered judgment for the defendant; and the question here raised for consideration is, whether that judgment was erroneous. As the services of the plaintiff were rendered under a contract for a fixed period of labor, and as the plaintiff left the service of the defendant without his consent, and before the fulfilment of the contract, his right to recover for the services actually rendered must depend upon the fact, whether the plaintiff had sufficient cause for leaving the employment of the defendant. For it is well settled by repeated adjudications in this state, that if a party, under a contract to labor for a specified period, leave the service of the party with whom he contracted, before the expiration of the time and without sufficient cause, he cannot sustain an action thereon. *Hair v. Bell*, 6 Vt. 35.

The question then arises, had the plaintiff sufficient cause to justify his leaving the service of the defendant? The case finds, that the defendant employed the plaintiff a portion of the time in ditch-

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ing upon lands other than the defendant's; but this would furnish no sufficient cause for abandoning the contract, inasmuch as the employment was with the *consent* of the plaintiff. *Hair v. Bell, ub. supra.* Indeed, the case does not disclose a single fact, that furnishes the slightest justification to the plaintiff for leaving the service of the defendant. The services rendered by the plaintiff were under a contract to labor for the defendant seven months. It was an entire contract, and the performance of it was a condition precedent to the plaintiff's right of recovery.

The judgment of the county court was correct and is affirmed.

**ALFRED MORRILL v. JOHN G. ADEN.**

Infancy is a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse, whether such action is in form *ex delicto*, or *ex contractu*.

But the infant must either affirm or avoid the entire contract; and if he choose to affirm it, after he becomes of age, by bringing an action upon the notes given upon consideration of the sale, he cannot, upon his plea of infancy, preclude the defendant from taking advantage of the false warranty, in any proper manner, as a defence.

It is well settled, that a contract may be avoided for an entire want of consideration, or failure of consideration. But where the plaintiff sold a clock and a horse for a harness and two promissory notes, and falsely and fraudulently warranted the horse to be safe and kind, and it appeared that the horse had such an inveterate habit of kicking as to render him worthless, it was held, that there was not such an entire failure or want of consideration as to constitute a defence to the notes, notwithstanding the clock had not been in fact delivered by the plaintiff.

But it was held, that the failure of consideration, in such case, was such as to authorize the defendant to rescind the entire contract; and it appearing that he had offered to do so in reasonable time, and that the plaintiff had refused to receive the horse and surrender the notes and harness, it was held, that this constituted a sufficient defence to an action upon the notes.

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ASSUMPSIT upon two promissory notes, dated June 5, 1845. The defendant pleaded the general issue, and also pleaded, in offset, that, on the 5th day of June, 1845, in consideration that the defendant would purchase of the plaintiff a certain mare, the plaintiff warranted the said mare to be kind and safe in the harness and suitable for the use of the defendant's family; and he averred a breach of the warranty. Trial by jury, June Term, 1846.—KELLOGG, J., presiding.

On trial, the plaintiff having given in evidence the notes declared upon, the defendant proved, that on the 5th day of June, 1845, the plaintiff sold to the defendant a horse and a clock, for which the defendant was to deliver to the plaintiff a harness and the two notes declared upon; and that the defendant delivered the harness and the notes to the plaintiff, and the plaintiff delivered the mare to the defendant; but there was no proof, that the clock had ever been delivered. The defendant also proved, that the plaintiff then warranted the mare to be kind and safe for any person to use; but that, in fact, the mare had such an inveterate habit of kicking, that she could not be harnessed without being fettered, that she was an unsafe and dangerous beast to use,—that by reason of her habit of kicking she was nearly or quite worthless, that all this was well known to the plaintiff before the sale, and that the defendant, upon the same 5th of June, 1845, upon discovering the vicious habits of the mare, requested the plaintiff to receive her back and surrender the harness and notes,—which the plaintiff declined doing. The plaintiff then proved, that at the time of the sale and warranty he was under twenty one years of age.

Upon these facts a verdict was taken for the plaintiff, by consent, for the amount of the notes, under a rule, that the court should enter a judgment for the plaintiff, or defendant, as the case might be, with liberty to the parties to except.

The court rendered judgment for the defendant. Exceptions by plaintiff.

A. Underwood for plaintiff.

1. There is a variance between the allegations in the plea in offset and the proof,—the sale of the clock not being alleged as a portion of the consideration for the harness and notes delivered by the de-

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fendant. 1 Chit. Pl. 263, 271. *Curley v. Dean*, 4 Conn. 265. 3 Stark. Ev. 1548-1562. *Swallow v. Beaumont*, 2 B. & A. 765. *White v. Wilson*, 2 B. & P. 116. *Vail v. Strong*, 10 Vt. 457. 1 Greenl. Ev. 79.

2. The minority of the plaintiff is a complete defence to the plea in offset. There was not a total failure of the consideration of the notes; and nothing short of this would defeat them. Issue is joined upon the plea in offset, and a breach of warranty is the *gist* of the matter. To this the plaintiff's minority is a complete answer; and he is therefore entitled to judgment on the verdict. *Jennings v. Rundall*, 8 T. R. 335. 1 Keb. 778. 1 Lev. 169. *Green v. Greenbank*, 4 E. C. L. 375. 2 Kent 241. Chit. on Cont. 123. 2 Stark. Ev. 724. *West v. Moore*, 14 Vt. 448.

T. Howard for defendant.

The case of *West v. Moore*, 14 Vt. 447, is not applicable to this case. That was an attempt, by an action of tort, to hold an infant liable for a false warranty that a horse was of a certain age; whereas in the case at bar the infant asks the court to allow him to use his privilege for the purpose of *enforcing* a contract founded in fraud, and without consideration.

It is well settled, that, if the consideration of a contract fail, or if there were no consideration, this will constitute a full defence under the general issue. 2 Vt. 439. 4 Vt. 174. 10 Mass. 254. 15 Johns. 230. 19 Johns. 53. 1 Stark. Ev. 280. The cases of *Farr v. Sumner*, 12 Vt. 28, and *Bigelow v. Kinney*, 3 Vt. 353, fully authorize a recovery by the defendant under the plea in offset.

The doctrine, that an infant may rescind his contract and yet retain the consideration, is wholly destitute of principle, and is not sustained by the authorities. In such case the parties are in the same situation, as if the contract had never existed.

The opinion of the court was delivered by

DAVIS, J. This is assumpsit on two notes payable in specific articles. The general issue was pleaded, and also a plea in offset, and issue was joined to the country.

It appears by the exceptions, that the consideration of the notes was the sale to the defendant of a mare and a clock. In addition

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to these notes the defendant delivered to the plaintiff, at the time he received the mare, a harness. The clock was never delivered. The plea in offset is founded upon a warranty, that the mare was kind and good to work, whereas, in truth, she had an inveterate habit of kicking, so that she could not be harnessed without being fettered, and was unsafe and dangerous to use, and worth little or nothing. The case shows, that the plaintiff knew of these vicious qualities of the animal when he sold her to the defendant. The reply which the plaintiff makes is, that he was under twenty-one years of age, when he made the warranty.

On the principles of the case of *West v. Moore*, 14 Vt. 447, it is obvious, that the offset cannot be sustained. In that case the action was brought in form *ex delicto*, and yet, being founded upon a contract, the court held that it was governed by the same principles, as if it had been assumpsit. Here it is assumpsit; had it been otherwise, this matter could not have been pleaded as an offset.

In analogy to the case of *Bigelow v. Kinney*, 3 Vt. 353, I think the whole contract must stand or fall together. It was competent for the plaintiff, when he came of age, to have disaffirmed the whole bargain, returning the harness and the two notes to the defendant and demanding the mare. Instead of doing so, he has, by bringing this suit, chosen to affirm it, in all respects, except that he wishes to extricate himself from that portion of it, which binds him to the observance of good faith and common honesty in the fulfilment of it. To permit him to do this would, instead of affording a salutary and necessary protection to infants from their contracts generally, enable them to use this privilege for the perpetration of frauds upon others. This would be manifest injustice. On this ground I am of opinion, that, by thus affirming the contract on his part, he is estopped from setting up infancy as a defence to that portion of the contract obligatory upon him. To adopt the language of PRENTISS, J., in the case above cited, "Nothing is clearer, than that a party cannot affirm an entire contract in part and avoid it in part." However, the court have chiefly regarded the present case under another aspect,—that is, under the plea of the general issue.

It is well settled, that, upon an entire want of consideration, or failure of consideration, the contract may be avoided. If the consideration for the notes had not included a clock, as well as the mare,

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which clock, though not delivered, for aught that appears the plaintiff was able and willing to deliver in accordance with the contract, we should have no hesitation, from the facts stated, in coming to the conclusion, that the mare might be regarded as affording no legal support to the promise on the part of the defendant. In such case he could not only resist the payment of the notes, but could maintain trover for the harness actually delivered. This last point was so decided on the present circuit, in a case in Windsor county.* The main facts were substantially the same as here, except that no question of infancy arose. A recovery was resisted solely, or chiefly, on the ground that the contract of sale was made on Sunday, and that, both parties being equally in fault, *potior est conditio defendantis*. This defence was not, however, allowed to prevail.

The sale of the horse and clock on one side for the harness and notes on the other constituted an entire contract; and a failure of value as to one of the articles would not necessarily render the whole contract without consideration, and for that reason avoidable. It is possible, that an inquiry as to the value of the clock might be gone into before the jury, and the damages be reduced *pro tanto*. The authorities on this point are conflicting, and we give no opinion respecting it.

We think, however, that the failure of consideration here was to such an extent, as to authorize the defendant to rescind the contract altogether. This he offered to do, in a reasonable time. Even if he had the right to *recoupe* the damages, or have them cut down to the value of the clock, still the purchase of the horse may have constituted the main inducement to the bargain, without which it would not have been entered into; and on that ground he ought to be allowed, at his own option, to treat it entirely as invalid. This is a doctrine in accordance with equity and justice, and sanctioned at law, as well as in equity, by the best authorities. Chancellor KENT says, [2 Kent 470,] "If a title to a part of the chattels sold had totally failed, so as to defeat the object of the purchase, as if A. should sell B. a pair of horses for carriage use, and the title to one of them should fail, it is evident, from analogous cases, that the whole purchase might be held void, even in a court of law." A

* Adams v. Gay, *ante*, page 358.

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similar principle was adopted by Lord KENYON, in respect to the purchase of three lots of real property at auction, the title to two of which failed. *Chambers v. Griffiths*, 1 Esp. R. 150. See, also, 11 Johns. 525. As applied in chancery, Lord BROUGHAM, it is true, was only inclined to admit the rule, with the qualification, that there was some connection between the different lots, so that a presumption shoud be afforded, that the purchaser would not have made the purchase, had he been aware of the true state of facts. 8 Cond. Ch. R. 516.

On the whole, the judgment of the county court is affirmed.

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SETH BURROUGHS v. WALTER WRIGHT, MOSES KITTREDGE AND JAMES RAMSAY.

[Same Case, 16 Vt. 619.]

Where property has been attached by one officer, and is in his custody, a return by another officer, who also holds a writ of attachment against the owner of the property, that he has attached the same property, subject to the first attachment,—still leaving the property in the possession of the first attaching officer,—will create no lien upon the property; and it makes no difference, that the officer making the first attachment was one of the plaintiffs in the second writ, and so could not serve it,—nor that it was at the time agreed between the two officers, that the writ held by the second officer should stand in any particular order of priority.

An attachment cannot exist without custody, or possession, either by the officer, or by his servant.

Where an officer attaches personal property upon three writs of attachment, and at the same time levies an execution upon the same property, subject to the attachment upon the three writs, and takes the property into his possession, and the executions obtained upon the three writs first served are placed in the hands of another officer, leaving the fourth execution in the hands of the first officer, this gives such other officer no right to take the property from the possession of the first officer.

And it makes no difference, in such case, that the second officer, upon receiving the executions, demanded the property of the first officer, and he consented that it might be taken, if such consent were in fact revoked, before it was acted upon by the second officer.

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And if, after such consent is revoked, the second officer take the property into his possession, he has no right to retain it, as against the first officer; and the first officer will not become a trespasser by retaking the property, to be disposed of upon the execution still retained by him;—nor will he become a trespasser, as to the second officer, by any subsequent irregularity in his proceedings upon that execution.

If an execution debtor consent that his property may be sold upon the execution without advertisement, the sale is valid, and is so far an official sale, that the officer's return upon the execution is *prima facie* evidence in favor of the officer and of those who acted under him.

TRESPASS for taking certain personal property, described in the plaintiff's declaration. Plea, the general issue, with notice of special matter of defence, and trial by jury, December Term, 1844,—
REDFIELD, J., presiding.

On trial the following facts appeared. The defendant Wright, who was a deputy sheriff, held four writs of attachment against the defendant Ramsay, in favor of Jacob C. Bean, John Bacon, John Kelly & Co. and the Farmer's & Mechanics' Co.,—the three first of which were placed in his hands for service, and the fourth he held but could not serve, for the reason that he was one of the company who were plaintiffs. Wright went to Ramsay's on the 10th of April, 1843, taking one French with him, for the purpose of making an attachment, and sent for the plaintiff, who was constable, to come and serve the writ in favor of the Farmers' & Mechanics' Co., and said to French, that he should wait, until Burroughs came to serve that writ, before he proceeded to make any attachment. The plaintiff came and took the writ in favor of the Farmers' & Mechanics' Co., and it was agreed that he should wait and attach a horse and sleigh, with which Ramsay, who was then absent, was expected soon to return. Wright then proceeded to attach the property, and was making his return, when the defendant Kittredge came and put into Wright's hands, for service, an execution in his favor against Ramsay for \$919.05. Ramsay returned without the horse and sleigh, and it was then arranged between Wright and the plaintiff, that the plaintiff should return, as attached upon the writ in favor of the Farmers' and Mechanics' Co., the same property which Wright returned upon the other writs and the execution in favor of Kittredge, and that the writ in favor of Bean should be the first in order of pri-

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ority, the writ in favor of the Farmers' & Mechanics' Co.. the second, the other two writs next, and then the execution in favor of Kittredge. A part of the property attached was left in the possession of French, and the remainder in that of Kittredge.

Judgments were duly obtained, on the 21st of April, 1843, in the actions upon which these writs issued, and the executions were placed in the hands of the plaintiff for collection, and he demanded the property of Wright on the 22d of April, 1843. Wright consented that he might take the property, and the plaintiff went and examined it, but did not take it into his possession. The plaintiff then advertised the property to be sold the 6th day of May, 1843, at one o'clock in the afternoon, upon the four executions in his hands. On the same day Wright advertised the same property to be sold upon Kittredge's execution, on the same 6th of May, at ten o'clock in the forenoon, and the plaintiff, having learned this, and that Wright intended to hold on upon the property by virtue of Kittredge's execution, on the same day, by direction of the creditors, or some of them, took down his advertisement and advertised the property to be sold May 6, 1843, at nine o'clock in the forenoon. After this, and on the same day, the plaintiff took the property into his possession.

On the fifth day of May, 1843, Ramsay wrote upon Kittredge's execution a request to Wright to sell the property on that execution, and thereby agreed to take no advantage of him for not advertising it according to law; and on the same day the defendants took the property, and Wright sold it upon Kittredge's execution. The judgments in favor of Jacob C. Bean, John Bacon and John Kelly & Co. against Ramsay amounted in the whole to \$47,50; and Wright returned, upon Kittredge's execution, that he tendered that amount, and all legal fees upon the three executions, to the plaintiff, and that he still held the same, the plaintiff having refused to receive it, and that he had paid the balance of the avails of the property, being \$103,23, to Kittredge.

The plaintiff objected, that Wright's return upon Kittredge's execution was not competent evidence to prove the facts therein stated; but the court overruled the objection.

The court intimated, that they should charge the jury, that, if the first attachment was made by Wright, and he was to be considered as having the custody of the property until the time of the demand

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made by the plaintiff,—which seemed to be implied from the returns on all the processes, and from the demand itself,—his assenting, at that time, that the plaintiff should take possession would not change the rights of the parties, until the plaintiff had actually taken possession under such permission ; that, if the plaintiff, before that was done, became aware of Wright's intention not to surrender the possession, and to sell upon Kittredge's execution, and he then went and took possession of the property, he would be in no better condition, than if Wright had never given any such consent ; that, considering the case aside from any surrender of possession by Wright, if he made the first attachment, and retained the possession of the property, the return of the attachment by the plaintiff upon the writ in favor of the Farmers' & Mechanics' Co. could not create any lien in their favor, as against Wright, or the creditors in the precepts in Wright's hands ; that until all those precepts were withdrawn, or satisfied, Wright was not obliged to surrender his possession, and the plaintiff was not justified in taking the property out of his possession, until Kittredge's execution was satisfied ; and that, after it was so taken, Wright might lawfully retake the property and sell it upon Kittredge's execution, in the manner returned thereon, and apply thereon the entire avails of the sale, unless the creditors in the other executions, besides the one in favor of the Farmers' & Mechanics' Co., perfected their lien by putting their executions into Wright's hands.

The plaintiff submitted to a verdict for the defendant, with leave to except.

T. Bartlett for plaintiff.

The proposition, that the Farmers' & Mechanics' Co., to create or preserve a lien upon the property, should have put their writ into Wright's hands is effectually answered by the fact, which now appears in the case, that Wright was one of the plaintiffs in that suit.

The plaintiff contends, that in point of fact the attachments were simultaneous. It does not appear, that Wright claimed to have the control and possession, as against the plaintiff, until after he levied his executions and removed the property. At the time of the attachment Wright did not claim the possession adversely to the plaintiff,

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but consented that the plaintiff might attach the property, and postponed two of his writs, to prefer the attachment of the plaintiff. If, then, the attachments were simultaneous, the plaintiff insists, that he had the same right to the possession that Wright had, and that Wright's possession was his possession. *Sigourney v. Eaton*, 14 Pick. 414. 19 Pick. 544.

The plaintiff insists, that the defendant had no right to take the property from his possession and sell it at private sale for the benefit of one creditor, to the exclusion of the first attaching creditor. Wright was bound to keep the property thirty days, that it might be charged in execution. Instead of doing this, he disposed of the whole property within fourteen days after the judgments were recovered; and doing this, after the plaintiff had, with his consent, taken possession of the property, was a conversion.

The county court erred in admitting the return of Wright on Kittredge's execution as evidence of the facts therein stated. The sale, being by agreement of parties, was not an official act.

for defendants.

That property in the hands of a sheriff may legally be sold, by the agreement of the debtor and creditor, has long been the settled law of the state. *Munger v. Fletcher*, 2 Vt. 524. If the return upon the execution is not admissible evidence in a court of justice, it is nugatory for all purposes;—but such, we apprehend, is not the law. If the sale was sufficient to transfer the property to the purchaser, of which there can be no doubt, the sale may be shown by *parol*, if the officer has made an insufficient return, or no return,—and if by parol, then certainly the return of the officer, under his official signature, should not be excluded. *Gates v. Gaines*, 10 Vt. 346.

It has been urged in this case, that one officer can attach property in the possession of another. Such practice we consider as tending to much confusion. Let the property be where it will, there is no constructive possession in any one but the attaching officer, while the lien created by the attachment is continued. *Watson v. Todd*, 5 Mass. 271. *Vinton v. Bradford*, 13 Mass. 114. *Tompson v. Marsh*, 14 Mass. 269. *Adams v. Abbot*, 2 Vt. 383. *Sawyer v. Middletown*, 10 Vt. 238. *Blake v. Shaw*, 7 Mass. 505.

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The bill of exceptions shows, that Wright consented that the plaintiff might take the property. This implies no obligation upon Wright, until the plaintiff acted in pursuance of it; and Wright might withdraw the consent at any time before the sale of the property by the plaintiff. Wright could make no agreement with the plaintiff, which would contravene his duty as a public officer, which would be binding upon him. It was his duty to sell the property upon Kittredge's execution; and if he had suffered it to go into the plaintiff's possession, either by misapprehension of the law, or by fraudulent connivance, it was equally his duty to repossess himself of it.

The opinion of the court was delivered by

REDFIELD, J. Many of the questions involved in this case were decided by this court on the former hearing. 16 Vt. 619.

1. That no lien was created in favor of the Farmers' & Mechanics' Co. by the plaintiff's service of their writ, as stated in that case. We do not think the difference in this case is important. It is true, that Wright could not have served that writ; but the plaintiff might have served them all; and if it was the desire of all concerned to have that writ served prior to Kittredge's execution, they could have put the processes into the plaintiff's hands. But the fact, that Wright could not serve this writ, is no reason why the court should attempt to create a lien, *without attachment*. The same reason will apply in all cases, where the officer is the *sole party*. But it will hardly be expected, in such cases, that a different rule is to apply. Nor is the case different, as to the facts, in any other material point.

2. It is of no consequence, so far as relates to the principle, whether Wright put *one* writ, or *three*, upon the property, before Burroughs was permitted to return his process. The only question is, did he make the *first* attachment, and did he keep the *exclusive possession*? These facts are expressly found by the jury. That, then, will effectually exclude all attachments by the plaintiff;—for an attachment cannot exist, without custody, or possession, either by the officer, or by his servant. Wright's agreement, that Burroughs' writ should stand in any given order of priority, can have no effect, so long as *no attachment* was in fact made.

3. There is no pretence of a simultaneous attachment in this case,

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if, indeed, any such thing can ever exist,—which I should somewhat question.

If, then, the plaintiff acquired no right to the possession of the property by the service of his writ in favor of the Farmers' & Mechanics' Co. against Ramsay, did he acquire any such right, when the executions upon the former attachments came into his hands? We think not.

It is not necessary to hold that the creditors in those executions lost their lien. Very likely they did not. It seems Wright so regarded it at the time; for he retained in his hands the amount of those executions,—which I do not see but Burroughs is still entitled to, if he properly charged the property in execution, as perhaps he did, by his demand of Wright. But clearly this gave the plaintiff no right to take the property out of Wright's hands, and thus defeat the lien upon Kittredge's execution. That lien could not be transferred to another officer, and, if the property were surrendered, would be gone, and Wright would thus become liable for the value of Kittredge's legal claim. The plaintiff, then, was clearly a trespasser in taking the property, unless Wright's consent, which was revoked *before it was acted upon*, created a right to possession in the plaintiff.

This consent was revocable, we think,—1. Because it was given without consideration, and the plaintiff made aware that it would be revoked before it was acted upon, and so the plaintiff was not misled or in any way injured by it. In short, being given without consideration, it would be revocable until acted upon; and if so revoked, as it was in this case, it would be, to all intents, the same as if it had never been given. 2. It was given by Wright under a *mistake* as to his own rights, and so clearly revocable, unless so acted upon as to place Burroughs in such a situation, that he would be injured, if the permission were revoked,—which was not the fact in this case.

Burroughs, then, at the time he took the property, having no *right* to the possession, but that being in Wright, *he* might well *re-take* it; and his subsequent proceedings, if they had been irregular, would not have made him liable in trespass to the plaintiff, as long as he was not a trespasser in taking the property from the plaintiff, and the plaintiff was not the general owner and had *no* right to the

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possession. If liable to any one, it would be to the debtor; but *he* having expressly waived all claim, and having consented to a sale without the requisite time of advertisement, the sale is binding upon him. The other creditors, if their lien was still kept good, have no reason to complain, so long as they might and may still, perhaps, have their money; and if they have lost this right, it is clearly by their own voluntary conduct, and not in consequence of any irregularity in this sale, or by being in any manner misled by that. We think the sale is therefore valid, and so far an official sale, that the return was *prima facie* evidence in favor of the officer and those who acted under him. It is not necessary to decide how far such a sale is to be treated as a sheriff's sale, *to all intents*. Perhaps, for some purposes, a sheriff's sale should be strictly *in invitum* in its full extent.

But, as the Farmers' and Mechanics' Co. had no lien, and the other liens have been satisfied,—or offered to be, which is the same thing,—and all the *other parties interested* have consented to the sale, we do not see what ground of objection there is left. This point was in effect decided in the former case reported.

Judgment affirmed.



ISRAEL CUTTING v. SAMUEL R. COX.

In the ordinary case of carrying on a farm at the halves, the owner of the farm is not so far divested of the possession, that he may not maintain trespass, in his own name, for any injury to the inheritance. As to the growing crops, in which the parties have a joint interest, they should join in the action. But where the tenant, in such case, disclaimed all occupancy of a portion of the land, in reference to which a controversy existed between the owner of the land and a third person, and refused to take possession of it, it was held, that the owner of the land might sue, in his own name, for an injury to the crops upon such portion.

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A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards; and in such action he may recover all damages intervening between the time of disseizin and re-entry, together with damages for a subsequent entry by the defendant.

The entry upon the land, by the owner, and measuring the lines, and asserting upon the land his claim of title, and directing his agent to cut the grass thereon, with notice of all this to the disseisor, constitutes a sufficient re-entry by the owner, to enable him to recover damages, in an action of trespass, for the value of the grass which the disseisor subsequently cut upon the land.

TRESPASS quare clasum fregit. Plea, the general issue, and trial by the court, June Term, 1846,—KELLOGG, J., presiding.

Upon trial the facts appeared as follows. The trespass was alleged to have been committed upon a lot of land in Walden. In April, 1845, the plaintiff received a lease of a portion of the lot from the selectmen of the town, extending from the south line of the lot fifty rods on the west line and sixty rods on the east line. The defendant received from the selectmen a lease of the remainder of the lot. One Goochy had a right to occupy the plaintiff's portion of the lot, under a written contract, by the terms of which he was to have one half of the produce, and certain compensation for each acre of wild land, which he might clear; and Goochy's half of the crops was to remain in the plaintiff's hands, as security for any advances which the plaintiff might make to him.

After the parties had taken their leases, a question arose as to the division of the lot; and the defendant and Goochy measured the lines, and made what they supposed to be the true division. Soon after, that is, in April, or May, the defendant and Goochy made a division fence, agreeably to their measurement. The defendant occupied to the fence, claiming to have title to the land, until about the first of September after; when Cutting, by accurate measurement, ascertained that the fence was about a rod and a half on his land. The defendant was present at that time, but, after the measure was made, refused to acquiesce and remained in possession, as before. Cutting then told Goochy to cut the grass between the fence and the line measured by him,—which, for the purpose of this trial was conceded to be the true line,—and Goochy informed the defendant of this. The defendant then cut the grass, to the fence.

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Previous to the execution of these leases both parties had been in possession of this lot,—but under a different division from the one made by the leases,—and had some difficulty respecting their lines; and Goochy, when this difficulty arose, said he would have nothing to do with the land in dispute;—but it appeared that Goochy acted as the agent of the plaintiff, in keeping possession of the land in dispute. It did not appear, that Goochy had authority to measure the lines with the defendant in any manner.

The county court rendered judgment for the plaintiff, to recover the value of the grass cut by the defendant between the fence and the line measured by the plaintiff. Exceptions by defendant.

B. N. Davis for defendant.

Trespass *quare clausum fregit* can only be maintained by him, who has actual possession of the premises at the time the act complained of was committed. 1 Chit. Pl. 176. *Ripley v. Yale*, 16 Vt. 257. 9 Johns. 61. 1 Ib. 5. 12 Ib. 183. 8 Mass. 411. *Wheeler v. Hotchkiss*, 10 Conn. 225. 9 Ib. 216. *Catlin v. Hayden*, 1 Vt. 375. The contract between Goochy and the plaintiff shows, that Goochy was the tenant of the plaintiff, with the exclusive right of possession, rendering to the plaintiff by way of rent, one half of the produce of the land. The most the plaintiff could claim would be as tenant in common of the crops, with the possession of the land in his tenant until the crops were divided.

2. The defendant having been put in possession of the land in question by Goochy, whether he were agent or tenant of the plaintiff, his possession was exclusive, and therefore neither Cutting, nor Goochy, as tenant, nor both, as tenants in common, could maintain trespass *quare clausum fregit*, until he was dispossessed. 8 Mass. 411. 1 Chit. Pl. 177. *Ripley v. Yale*, 16 Vt. 257. *Bakersfield Cong'l Soc. v. Baker et al.*, 15 Vt. 119.

S. B. Colby for plaintiff.

1. The plaintiff, having entered and taken possession of the land described in his lease, is deemed to be in possession of the same to the extent of his written claim of title. *Spear v. Ralph*, 14 Vt. 400. The defendant should derive no benefit, by reason of having enclosed a part of the plaintiff's land with only the assent of Goochy,

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who had no authority. *Crowell v. Bebee*, 10 Vt. 33. *Stuyvesant v. Tompkins*, 9 Johns. 61; 11 Ib. 569.

2. The case finds, that the *true line* was run in September, the plaintiff and defendant being present together on the disputed land; and the plaintiff then asserted his right, and instructed his agent to cut the grass on the piece fenced off,—of which the defendant had notice. This was sufficient entry and notice to entitle the owner to his action of trespass, and is fully within the principle of *Butcher v. Butcher*, 14 E. C. L. 59. 3 Bl. Com. 175. Co. Lit. 15. *Beecher v. Parmele*, 9 Vt. 352.

3. The tenancy of Goochy cannot deprive the plaintiff of his action. 1. The piece in controversy was excepted from the operation of the lease. 2. Goochy was the plaintiff's agent in keeping possession of the land. These facts are found by the county court.

The opinion of the court was delivered by

REDFIELD, J: As between the plaintiff and Goochy, the question, which should bring the action, may be in some sense determined by inquiring who was injured by the trespass complained of. If this were the ordinary case of carrying on a farm at the halves, it has not been considered that the owner of the land is so far divested of the possession, that he may not maintain trespass, *in his own name*, for any injury to the *inheritance*,—as digging stone, or cutting timber. As to the growing crops, in which the parties have a joint interest, the parties are treated as tenants in common, or, more properly, joint tenants, perhaps, and they should join in the action. If they do not join, the non-joinder can only be pleaded in abatement. If not so pleaded, it will only affect the question of damages. These principles being merely elementary, it is hardly necessary to quote authorities.

This might be the present case, if the land in dispute formed a portion of the premises in the occupancy of Goochy at the time of the alleged trespass. But that does not seem to be the fact. Goochy disclaimed all possession in his own right, and said he would have nothing to do with this land. It is conceded, that the land belonged to the plaintiff. It seems clear, if Goochy was not in possession and would not consent to take possession, in his own right, that no action could be maintained in *his name*. If not, then the

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plaintiff must be permitted to sue in his own name, or he cannot sue at all.

The only remaining question is, whether the plaintiff has elected the proper form of action. It appeared in the case, that the defendant took possession of the land under a mistaken division, made between him and Goochy, which Goochy had no right to make on the part of the plaintiff. But the defendant had taken actual possession in such a manner as to create a disseisin, at the election of the plaintiff; and, after the true line was ascertained, the defendant persisted in maintaining his possession,—which would clearly justify the plaintiff in treating it as a disseisin and bringing ejectment.

But in all cases of disseisin the plaintiff may also maintain trespass, if the entry were made while he was himself in possession; but in such case the damages will be restricted to the first entry, unless the plaintiff make a re-entry upon the land before action brought. In such case he will recover all his intervening damages, the same as if he had brought ejectment and recovered the seisin. If the plaintiff can re-enter upon the land, it is the same, as to recovering intervening damages, as if, at common law, he had first re-seized himself by a recovery in ejectment. And if the defendant still maintains his possession, it makes no difference; he is still considered a trespasser upon the lawful owner of the land, so long as he shall continue to re-invest himself with the possession of the land by re-entry. After the re-entry the law considers the freehold and possession to have all along continued in him; and the disseisin is cured by the re-entry, until some fresh act of disseisin,—which is itself a trespass, in the first instance, as every disseisin includes a trespass; and if continued, there must again be a re-entry.

This is fully sustained by the case of *Butcher v. Butcher*, 14 E. C. L. 59. The wrong doer cannot treat the lawful owner as a trespasser; and if not, then the continuance of the defendant's possession was itself a trespass, as is said in the case of *Butcher v. Butcher*.

In the present case it is very obvious there was a sufficient re-entry by the plaintiff; and from that time the lawful possession would be in him, until the defendant did some act of disseisin,—which seems to have been the cutting of the grass complained of, which was a trespass for which the plaintiff might well recover.

Judgment affirmed.

Sutton *v.* Cabot.

TOWN OF SUTTON *v.* TOWN OF CABOT.

Upon an appeal from an order of removal of a pauper, the question, whether the pauper had come to *reside* in the town procuring the order, within the meaning of the statute, may be presented by plea, as well as by motion to quash the proceedings.

There is nothing in the third section of chapter sixteen of the Revised Statutes, in relation to the removal of paupers, which authorizes the removal of a transient pauper.

In this case the pauper was an old lady, who had resided for several years with her son in Cabot. In December, 1844, she went to Sutton to visit her daughter, taking nothing with her but a change of raiment, and intending soon to return. In February, 1845, about the time she intended to return, she had a slight attack of sickness, which prevented her returning at that time. In April, 1845, the day before she was again expecting to return to Cabot, she had a more severe attack of sickness, which rendered it impossible for her to return; and in this state she remained until June 9, 1845, when application was made to the town of Sutton for aid in her support; and they maintained her from that time until her decease, which was in September, 1846. On the 22nd of October, 1845, the town of Sutton procured an order of removal; and previous to that time there had been no change in the determination of the pauper to return to Cabot, except what resulted from the impracticability of such return. In September, 1845, her son, with whom she had resided in Cabot, lost his wife by death, and in November, 1845, he ceased to keep house and removed to Walden, where he boarded with his daughter;—and from this time there was no evidence that the pauper expected she should ever be able to leave Sutton. And it was held, that the pauper had not come to *reside* in Sutton, within the meaning of the statute, at the time the order was made, and that the defendants were entitled to a verdict.

APPEAL from an order of removal of Mehitable Smith, a pauper, from Sutton to Cabot, made by two justices of the peace, pursuant to the statute. The defendants pleaded, first, that, at or before the time of making the order of removal, the pauper had not come to reside, and did not reside, in Sutton; and secondly, that the last legal settlement of the pauper, at the time the order was made, was not in Cabot. The plaintiffs objected to the first plea, as being a matter which could only be taken advantage of by motion to quash; but the court decided, that the matter might be pleaded in bar; and

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the case was tried by jury, December Term, 1846,—REFIELD, J., presiding.

The jury returned a special verdict. The facts in reference to the settlement of the pauper need not be detailed here, as no decision upon that point was made by the supreme court. The facts in reference to her residence were as follows.

For some years previous to December 24, 1844, the pauper had resided with her son John Smith, Jr., in Cabot, who had supported her without compensation. At that time, being nearly eighty years of age, she felt anxious to visit once more her daughter, who resided in Sutton; and she accordingly went there for that purpose, taking with her nothing, except a necessary change of raiment and a blanket to keep her comfortable on the way, and expecting to return to her son's, in Cabot, in a few weeks, after she had completed her visit; and he expected her so to return. About the time she intended to return, February 8, 1845, she had a slight attack of the palsy, which prevented her returning at that time; but she so far recovered from this in the month of April following, that she expected to have returned to Cabot the next day, when she had a more severe attack, which rendered it impossible for her to return; and she remained in this condition until the ninth of June, when application was made to the town of Sutton for aid in her support; and they maintained her from that time until her decease, which was in September, 1846. The last of June or first of July, 1845, three sheets and three pillow cases were brought to her, for her use, from her son's house in Cabot. The order of removal was made October 22, 1845; and there was no change in the determination of the pauper to return to Cabot, before the order of removal, except what resulted from the impracticability of such return. But at that time there was no reasonable probability that she ever could return; nor was there any evidence that she then expected to return;—but if she had recovered she would undoubtedly have returned to Cabot. The wife of her son John died in Cabot in September, 1845; and in November, 1845, he ceased to keep house, and removed from Cabot to Walden and became a lodger in the family of his daughter. From this time there was no evidence that the pauper had any reason to expect, or that she did expect, she should ever be able to leave Sutton, or that she had any hope of ever going to Cabot, or Walden.

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From these facts, under the direction of the court, the jury found, that the pauper had not come to reside in the town of Sutton, and was not liable to be removed therefrom; but they found, that her last legal settlement was in Cabot. Exceptions by plaintiffs.

G. C. Cahoon for plaintiff.

T. Bartlett, Jr., and William O. Fuller for defendants.

The opinion of the court was delivered by

DAVIS, J. This was an appeal from an order of removal of one Mehitable Smith from Sutton to Cabot, made October 22, 1845. Two pleas were interposed by the defendants in the county court,—one of which was the usual plea to the merits, that the pauper's last place of legal settlement was not in the town of Cabot. This issue was found against the defendants; and, so far as regards the last place of legal settlement, no question is presented for this court to pass upon.

A farther plea, however, was interposed, to the effect, that the pauper had not come to reside in the town of Sutton, within the true intent and meaning of the fourth section of the Revised Statutes, relating to the support and removal of paupers, and so was not subject to the process of compulsory removal adopted in the case. Issue was taken upon this plea, also, and was found in favor of the defendants. The plaintiffs' counsel objected to this plea, as containing matter which could not be insisted upon by way of plea; but that, if available in any way to defeat the order, it could only be presented by a motion to quash the proceedings for that cause.

It is not easy to understand on what principle such a distinction can be sustained. Granting that it could be presented in the mode proposed,—and I am inclined to think, notwithstanding it puts in issue new matter, not apparent of record, that it might have been so presented,—it by no means follows, that it could not also have been done by plea, as in this case. Should it be farther conceded, that the subject matter is of a nature merely dilatory, not affecting the final merits, it is not perceived how that circumstance excludes the right of presenting it by plea. Matters in abatement, or temporary bar, constitute as proper subjects for a plea, as those of a different character.

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The effect of a verdict against the plaintiffs, however, may be quite different, according to the nature of the questions determined by it. The distinction is of no practical importance in this case, as the pauper has deceased. The verdict determined, that her legal settlement was in Cabot, but, at the same time, that she was only transiently in Sutton, and, though needing relief, was not subject to removal. The plaintiffs were doubtless entitled to reimbursement for their expenditures; but a removal was neither necessary, nor allowable.

The counsel for the plaintiffs have urged, that the present revised code, by the enactment in the third section, making it the duty of the overseers of the poor of the several towns to provide for the comfort and relief of all persons residing in their respective towns, when in distressed circumstances, though having no legal settlement there, *until they can be removed*, has extended the right of removal to transient persons, as well as those who have come to reside, as provided in the fourth section. This is a mistake. The third section of the old code and the fourth section of the new one are substantially alike, and require a similar construction; and nothing in the third section of the new code can have any effect in modifying that construction.

The judgment of the county court is therefore affirmed.

Martin v. Bowker.

HEZEKIAH MARTIN v. BARTLETT BOWKER.

I N C H A N C E R Y.

Where a defendant, in his answer to a bill of foreclosure, insists that he has made payments upon the mortgage notes, and it is referred to a master to ascertain the sum due in equity, and he makes his report, to which no exceptions are taken, no question can be made upon that point in the supreme court, upon appeal.

Courts of equity act in analogy to the statute of limitations; and if, in a suit for the foreclosure of a mortgage, the lapse of time be such, that the orator could not maintain a suit at law for the recovery of the mortgaged premises, a court of equity would presume payment and satisfaction of the mortgage debt. This period is fixed, by our statute, at fifteen years.

But the payment of interest upon the debt, by the defendant, or of any portion of the principal, or any other act recognizing the existence of the mortgage and that it was unsatisfied and obligatory upon him, would be sufficient to repel the presumption of payment and take the case out of the operation of the statute.

A P P E A L from the court of chancery. The bill was brought for the foreclosure of a mortgage, executed December 9, 1820; and the subpoena was dated November 21, 1844. The defendant answered, alleging that he had made various payments upon the mortgage notes each year from 1827 to 1831 inclusive, and also claims the benefit of the presumption arising from lapse of time. The answer was traversed, and testimony was taken; the substance of which is sufficiently detailed in the opinion of the court. It was referred to a master to ascertain the sum due in equity,—which he reported was \$98,58; and no exceptions were taken to the report.

The court of chancery ordered, that the defendant pay the sum reported by the master by a time specified, or be foreclosed of all equity of redemption in the mortgage premises. From this decree the defendant appealed.

E. Paddock for plaintiff.

T. Bartlett, Jr., and Wm. O. Fuller for defendant

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The opinion of the court was delivered by
KELLOGG, J. This was a bill for the foreclosure of a mortgage. The defendant, in his answer, admits the execution of the mortgage deed and notes, but insists that he made sundry payments upon the notes. The case was referred to a master, who reported the sum due in equity; to which there were no exceptions. The sum thus reported must, therefore, be considered the sum due upon the mortgage securities, and upon which no question can now arise.

But the defendant, in his answer, insists upon the statute of limitations as a bar to this suit; and that is the only question raised for the consideration of this court.

It is well settled, that courts of equity act upon the analogy of the statute of limitations; and if the lapse of time, in the case at bar, be such, that the orator could not maintain his suit at law for the recovery of the mortgaged premises, then a court of equity would not sustain a suit for the foreclosure of the equity of redemption, but would, from such lapse of time, presume payment and satisfaction of the mortgage debt. This period is, by our statute, fixed at fifteen years. In the case at bar more than fifteen years elapsed after breach of the condition of the mortgage and before the commencement of this suit; and consequently the suit would be barred, unless something has intervened to take the case out of the operation of the statute, or to repel the presumption of payment resulting from the lapse of time.

The payment of interest upon the debt, or any portion of the principal, by the defendant, or any other act recognizing the existence of the mortgage, and that the same is unsatisfied and is obligatory upon him, will be sufficient to repel the presumption of payment and take the case out of the operation of the statute.

The testimony in the case shows, that, in March, 1844, the orator and the defendant went into an accounting for the keeping of stock by the defendant for the orator, and for the defendant's personal services; and that the amount found due upon such accounting was, by the consent of the parties, endorsed upon one of the mortgage notes. It was, then, a payment, to that amount, by the defendant, and was such a recognition of the mortgage, as would take it out of the operation of the statute. Again, the testimony shows, that there was talk between the parties of the defendant's taking up the mort-

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gage notes and having new notes executed for the balance,—which the defendant declined, saying, "*the orator would feel easier to have the payment endorsed, and so keep the mortgage good.*" This, then, was a recognition of both the notes and mortgage. But the case farther shows, that the defendant, in his answer, admits the making of payments, to be applied upon the notes, as late as 1831, which was less than fifteen years anterior to the commencement of this suit; and that would be sufficient to take the case out of the statute of limitations.

Upon the whole, we are satisfied that the suit is not barred by the statute, and consequently that the decree of the chancellor should be affirmed.

**ABRAHAM MORRILL v. KITTREDGE & MORRILL.****IN CHANCERY.**

In this court appeals from the court of chancery are invariably heard entire.

Objections to mere matters of form, which are regulated by the established rules of the court of chancery, will be considered as waived, if not taken in that court;—and if taken there, and overruled, the decision of that court will be held final.

APPEAL from the court of chancery. The counsel for the orator interposed a motion in this court to order the defendants' exceptions to the master's report to be taken off the file, and the case to proceed to a hearing, as if there had been no such exceptions. This application was founded upon some alleged irregularity in the filing of the exceptions.

THE COURT refused to have the motion argued, as a preliminary question, upon the ground, that, in this court, appeals from chan-

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cery are invariably heard entire, and said, that little would be gained by giving the original chancery jurisdiction of this court to the several members of the court, if every little matter of form were to be a ground for reversing the decree, and the objections were to be taken up in the order in which they occurred in the progress of the cause; that objections to these mere matters of form, which are regulated by the established rules of the court of chancery, mainly to expedite the business in that court, if not taken in that court, will be considered as waived,—certainly, so far as they are of such a character, that, if pointed out, they might have been obviated in that court; and that, when objections are taken in the court of chancery, and are there overruled, the decision of that court in regard to matters depending upon their rules, or in regard to the time, or form, of taking any particular proceeding, will be held final in this court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX.

APRIL TERM, 1847.

PRESENT,

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG, } ASSISTANT JUDGES.
HON. CHARLES DAVIS,

STATE v. GEORGE D. BEAN.

If one of the counts in an indictment is correct, it is sufficient, upon motion in arrest of judgment.

In an indictment for forgery a variance between the count and the forged instrument, in the spelling of a name, is unimportant, if the same sound is preserved.

Where the averments in an indictment for forgery improperly describe the import of the obligation of the contract forged, this defect is not cured by reciting the instrument *in hac verba*;—but a note in these words,—“ For value received I promise to pay Mr. Frank Wilson, or order, the sum of \$25,60 to *bads* the first day of January next and interest,”—sufficiently imports, that it is made payable the first day of January next ensuing its date, and will support an averment to that effect in an indictment for forgery.

INDICTMENT for forgery. In the first count it was alleged, that the respondent forged a certain promissory note, “ purporting to bear ‘ date the twenty-eighth day of April, in the year of our Lord one

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' thousand eight hundred and forty-six, and to have been signed by ' one David Harriman and one Samuel Gates, for the payment of ' twenty-five dollars and sixty cents the first day of January then ' next after the date of said note, with the interest, to one Francis
' Willson, or his order, the tenor of which ~~said forged~~ promissory
' note is as followeth, that is to say,—*April the 28 day year 1846,*
For value received I promise to pay Mr Frank Willson or order the
sum of twenty five dollars and sixty cents to Bade the first day of
January next and instant, (signed) David heremon. Samuel Gates;—
' with intent," &c. The second count was similar, except that it described the note as made payable "to one Mr. Frank Willson," but recited the note, as in the first count. Trial by jury, December Term, 1846.—DAVIS, J., presiding.

On trial the forged note was offered in evidence, and was, in all respects, as recited, *in hoc verba*, in the indictment. The respondent objected to its admission, upon the ground of variance; but the objection was overruled by the court.

Other questions were raised; but as they were not insisted upon in the supreme court, they need not be noticed here.

Verdict of guilty. Exceptions by respondent.

—— for respondent.

The paper offered in evidence as the forged note does not agree with the description of it contained in the indictment. It does not purport to be payable on the first day of January next after its date, nor to be payable to Francis Willson, nor to be signed by David Harriman. It does not help the indictment, that a literal copy of the note is given in both counts. Arch. Cr. Pl. 45. The instrument must be correctly described, or the respondent will be acquitted. Arch. Cr. Pl. 91, 94-97, 339. *Rex v. Jones*, 1 Doug. 300. *Rex v. Reading*, 1 East 180, n. 2 Leach 590. *Rex v. Gilchrist*, Ib. 657. *Rex v. Edsall*, Ib. 662, n. *Rex v. Hunter*, Ib. 624. 2 East P. C. 928. *Rex v. Barton*, 1 Mood. C. C. 141.

Wm. T. Barron, state's attorney.

A promise to pay is distinctly expressed in the note, without the words "*to Bade*," and the purport of the note is so stated. Those words are meaningless and can have no purport. *Purport* means

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the substance of an instrument, as it appears, on the face of it, to every eye that reads it. 2 Russ. on Crimes 388.

The error in the first count, in averring the note to have been made payable to Francis Willson, is corrected in the second count; and, the verdict being general, the conviction must be sustained. *State v. Davidson*, 12 Vt. 300.

The opinion of the court was delivered by

REDFIELD, J. The only exception now insisted upon is in regard to the variance. As to the person to whom the note is made payable, it is correctly described in the second count; and if one of the counts in an indictment is correct, it is sufficient.

The difference between *Herriman* and *Harriman* is unimportant; it is obviously *idem sonans*, which makes the names the same in law,—for no man is to be acquitted in consequence of bad spelling, merely, in the indictment, if substantially the same sound is preserved. In many names the “e” is sounded like the “a,”—as in most names coming from the continent in Europe. This name is of that character, when spelled with an “e” in the first syllable.

As to the term found in the note, “*to bade*,” whether it is wholly unmeaning, or imports “*to be paid*,” is not important, perhaps. For if wholly stricken out, the note is then payable upon the first day of January;—and if these words have any meaning, they do mean *to be paid*.

It is true undoubtedly, as insisted, that the averments of the obligation, which the note imported, must not be inconsistent with those which seem to flow from it, *as set forth in the bill*; otherwise the judgment will be arrested. And therefore, where the averments in the indictment improperly describe the import of the obligation of any contract forged, this defect is not cured by reciting the instrument *in haec verba*.

Judgment, that respondent take nothing by his exceptions. Sentence, three years in the state prison.

Hopkinson, Adm'x, v. Guildhall.

DORCAS HOPKINSON, Administratrix of DAVID HOPKINSON, v.
TOWN OF GUILDHALL.

Where a suit is prosecuted by an administratrix for the benefit of the heirs at law of the estate, the heirs, in case of failure to recover, are liable to contribute for the payment of the costs incurred; and one of the heirs, who has received a portion of the estate in land, is not rendered a competent witness for the plaintiff by executing to her a release of all his interest in any portion of the estate growing out of the claim in controversy,—his liability for costs being thereby in no manner affected.

TRESPASS ON THE CASE for the default of John P. Denison, constable of Guildhall, in not keeping and delivering up on demand certain property attached upon a writ in favor of the intestate against James Steele. Plea, the general issue, and trial by jury, May Term, 1846.—KELLOGG, J., presiding.

On trial, for the purpose of using John H. Hopkinson, one of the heirs at law of the intestate, as a witness on the part of the plaintiff, the said John executed in court a release of the following tenor;—
'Essex County, ss. May 26, 1846. For value received of Dorcas Hopkinson, administratrix of the estate of David Hopkinson, late of Guildhall in said county of Essex, I hereby release and discharge to said Dorcas all right, title, interest, claim and demand, which I have, or may have, to any portion of the estate of said David Hopkinson, growing out of a claim against John P. Denison, as constable of said Guildhall, and which claim is now in controversy between said Dorcas, Adm'x, and said town of Guildhall. Witness my hand and seal," &c. It was admitted, that the estate of the deceased had been so far settled, that the real estate had been divided among the heirs,—a portion being distributed to said John,—and that the personal estate was all consumed in the payment of debts. The defendants objected to the sufficiency of the discharge; but the court overruled the objection and admitted the witness to testify.

Verdict for plaintiff. Exceptions by defendants.

Heywood for defendants.

The release was insufficient, for the reason that John H. Hopkinson was interested in the event of the suit, on account of the costs.

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If costs had been recovered against the administratrix, she could pay the same and retain the amount out of the assets, if she had any; and if not, the heirs who have received lands would be bound to contribute for that purpose. Rev. St. c. 49, §§ 45, 46, 48, 49, *Fletcher v. Grover*, 11 N. H. 369, *Ford v. Ford*, 17 Pick. 418.

T. Bartlett and Wm. O. Fuller for plaintiff.

The present question is unlike that raised in *Baxter, Adm'x, v. Ruck*, 10 Vt. 548. The estate of Hopkinson had been so far settled, in the present case, that the real estate had been divided among the heirs, of whom John H. Hopkinson was one, and the personal estate had all been consumed in the payment of the debts. The sum recovered will be assets in the hands of the administratrix, and will constitute the whole of the personal estate unconsumed in the payment of debts; and to this the witness has released all his interest. He is not an heir expectant upon the settlement of the estate, but an heir in possession of his share of the estate. The probate court have no authority to decree distribution among the heirs, until after the payment of all liens and charges upon the estate. Rev. St. c. 53, § 3. Then the witness holds his share absolutely, subject to no charge, or lien. If the plaintiff should fail to recover, the defendants' judgment for costs would constitute no lien upon the estate. How could the administratrix ever enforce such a decree against the estate? The probate court has no power to vacate the former decree, annul the title of the heirs, and order a new and different distribution. But supposing the heirs, in consideration of having been admitted to their respective shares in the lands of the ancestor, would in equity be bound to contribute; this would not be true of John H. Hopkinson, who, pending the suit, has released all his interest in the demand. If the heirs, in equity, are bound to contribute, contribution should be made by those, only, who are to be benefited by the plaintiff's recovery.

The opinion of the court was delivered by

KELLOGG, J. The only question, presented in this case for the consideration of the court, is as to the correctness of the decision of the county court, in admitting the testimony of John H. Hopkinson. The witness was an heir at law to the plaintiff's intestate;

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and, previous to his admission, he executed to the plaintiff a release of all his interest in the suit. It is, however, insisted, that he still remained interested, being liable, in the event of the plaintiff's not succeeding in the suit, to contribute to her towards the costs incurred in the prosecution ;—and we think this exception is well taken. The suit was prosecuted for the benefit of the heirs at law ; and, in case of failure to recover, the heirs would all be liable to contribute to the costs incurred ; and the release of the witness to the plaintiff did not discharge him from that liability.

The witness was incompetent and consequently the ruling of the court below manifestly erroneous ; and for this cause the judgment of the county court must be reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS.
APRIL TERM, 1847.

PRESENT,

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG, { ASSISTANT JUDGES.
HON. CHARLES DAVIS,

NATHANIEL WEST v. ISRAEL CUTTING.

Where a sale of personal property is absolute, and there is no fraud, the vendee cannot compel the vendor to receive back the article, if it proves deficient in quality; but he must resort to his action upon the warranty, if there were one.

Where the defendant sold to the plaintiff a quantity of tea, which proved not to be good, and the plaintiff returned the tea to the defendant, who received it, and said that he should have some good tea soon and would replace it, to which the plaintiff assented, it was held, that this did not prove an absolute contract of rescinding, which would make the defendant debtor to the plaintiff, either for the money, or for the tea, unless called for; and that it imported no obligation, on the part of the defendant, to carry the tea to the plaintiff.

In such case the obligation of the defendant, being merely to deliver tea when called for, could not, by mere lapse of time, become an obligation to pay money.

But in this case, which was an action on book account, the facts being very indefinitely stated by the auditor, the report was re-committed.

West v. Cutting.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts as follows.

The plaintiff's account contained a charge for cash, five dollars;—and this was the only item, in reference to which controversy was had. This sum was sent by the plaintiff to the defendant for some tea. The tea was procured at the defendant's store, and was shortly after returned by the plaintiff to the defendant,—“it not being good.” The defendant received the tea, and said that he should have some good tea soon, and would replace the tea returned with good tea. The defendant retained both the tea and the money, and never delivered any other tea to the plaintiff, nor did the plaintiff ever call upon the defendant for any other tea.

The auditor allowed this sum to the plaintiff; and the county court, December Term, 1846,—DAVIS, J., presiding,—accepted the report and rendered judgment thereon for the plaintiff. Exceptions by defendant.

Merrill & Colby, Redfield and Peck for defendant.

1. The plaintiff had no right to rescind the contract, by tendering back the tea, and demanding the consideration paid, there having been no fraud found on the part of the defendant.

2. If it be claimed, that the defendant, by receiving back the tea, has conceded the right of the plaintiff to rescind the contract, then his concession must be taken with the condition annexed, that the plaintiff should have *other tea*, in lieu of the tea returned; and it would seem there was a tacit assent, at least, to this arrangement, on the part of the plaintiff. *Weston v. Downs*, Doug. 23. 2 Com. on Cont. 66. But if we should concede that the contract was rescinded, no right of action would accrue to the plaintiff until after demand made. *Jones on Bail*. 52, n. *Brown v. Cook*, 9 Johns. 361. *Warner v. Wheeler*, 1 D. Ch. 159. *Topham v. Braddick*, 1 Taunt. 572. *Chadwick v. Divol*, 12 Vt. 499. *Stoddard v. Chapin*, 15 Vt. 443.

3. The action on book account will not lie to recover the \$5,00 for tea returned. If there be no right to charge on book at the time of the delivery of the property, no subsequent contingencies can give it. *Nason v. Crocker*, 11 Vt. 463. *Slason v. Davis*, 1 Aik. 73. *Hall v. Eaton*, 12 Vt. 510.

West v. Cutting.

Cooper and Johnson & Prentiss for plaintiff.

The money of the plaintiff is in the defendant's hands, which, *ex aequo et bono*, he ought not to retain. The sale was rescinded by mutual consent; but the money was not returned. The defendant agreed to replace the tea sent back; which he never did, although a reasonable time had elapsed before the commencement of this suit. It was money advanced on a contract, which the defendant neglected, or failed, to fulfil, and may be recovered back either in book account, or assumpsit for money had and received. *Rogers v. Miller et al.*, 15 Vt. 431. *Hickok et al. v. Ridley*, Ib. 42. *Stone v. Pulsipher*, 16 Vt. 428. *Giles v. Edwards*, 7 T. R. 181. *Weeks v. Hunt*, 13 Vt. 144. 1 Sw. Dig. 582. Book account and assumpsit are concurrent remedies, in such a state of facts. *Way v. Raymond*, 16 Vt. 371. *Weller v. McCarty*, Ib. 98.

No demand was necessary before suit brought. 1. Because a reasonable time had elapsed to return the money or send the tea. 2. Because the obligation rested peculiarly on the defendant. 3. Because it was a matter peculiarly within the defendant's knowledge, when he would have good tea; he was bound to replace the tea, when he received good tea, or to return the money; and the plaintiff was only bound to wait a reasonable time. Chit. on Cont. 732. 1 Chit. Pl. 362, 384. 10 Mass. 231. 16 Vt. 98. Ib. 87. 5 Vt. 451. 15 Vt. 42. 3 Vt. 58. 7 Vt. 223. 16 Vt. 372.

The opinion of the court was delivered by

REDFIELD, J. The questions of law arising in this case are nice, and not free from difficulty; and they are embarrassed with *inferences* of facts,—which can, *with propriety*, only be drawn by the auditor.

1. As the facts stand, the first inquiry is, could West compel Cutting to have taken the tea back? We think not. There is no pretence of any fraud on the part of Cutting, or of any agreement to take the tea back. The tea "was not good,"—a very uncertain definition of quality, and one which has been once held by this court to have no meaning, in a contract as to the quality of stoves; but the most, which could be made of it, is a warranty and a breach of it; which will only enable the vendee to recover damages for the breach, but will not entitle him to rescind and recover back the considera-

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tion. This is well settled, both in this country and England, *Thorn-ton v. Wynn*, 12 Wheat. 183; 6 U. S. Cond. R. 508.

2. Was there any contract of absolute rescinding, so as to make Cutting a *debtor*, either for the money, or for the tea, *unless called for*? We think not. There was no claim for the money. The defendant said he should have some good tea soon and would replace it; and to this West assented;—for by the report it does not appear but that he was personally present; and if he were not, it would make no difference; but we must take it as it is,—to this taking tea again he assented.

3. Was Cutting, then, to carry the tea to West? The term “*re-place*,” used by the auditor, is not intended to determine this, we take it; for if so, he could have been more explicit, and would have been, if that had been his intention;—but this is either the language made use of, or its equivalent. We do not attach any such importance to it, as we might in a written contract; for here we cannot know, that he used that word. If he said he would let Mr. West *have some tea again, or pay him that amount*, five dollars, *in tea*, or he should have some tea that *would suit*,—which is more probable, perhaps,—ten witnesses, who heard it, would use, each, different language in relating it, and the auditor still different from all, perhaps;—so that all we understand the auditor to find on this point is, that the defendant said he would pay the plaintiff in tea again, and the plaintiff acceded to it.

We think it obvious, then, that the defendant was not bound to deliver the tea, until called for, (unless there was some understanding to that effect,—and if so, it should be found by the auditor,) for two reasons;—1, It is wholly inconsistent with the uniform custom and course of business in the country,—so much so, as to be almost ludicrous;—2, One quality of what was such tea as the defendant bought and sold had been sent and returned; there was, then, an improbability, that he would *send again*; he would naturally choose to have the plaintiff *see it* and suit himself. This, then, seems to us the exact legal obligation of the defendant, at the time the tea was returned, as the facts are reported by the auditor.

4. If this is the legal obligation, then, of the defendant, we do not see how it becomes an obligation to pay money by *mere lapse* of time. If the defendant *were* to send the tea, doubtless he should

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send it in a reasonable time ; and if he fail, he is liable in this form of action. But if the plaintiff is to *call and take it*, then the defendant is not liable, until *called upon*, or until he consents to let it go in account,—which is not found, and is not an inference of law, and not a probable inference of fact, if the defendant had at the time no account against the plaintiff.

But the important facts, in regard to this case, should be more definitely found by the auditor. We think there must have been some definite understanding of the parties, at the time, in regard to this item ; and that *should govern*, and it *can* be found by auditors ; we think more proper, that the case should be determined upon the understanding of the parties, *at the time*, than upon any mere technical *legal intendment*. For this purpose the case will be referred to auditors in this court.

Judgment reversed, and case referred to auditors.



CALVIN S. GROW v. ELIJAH ALBEE.

Where usury is included in mortgage notes, and a bill of foreclosure is brought, the defence, based upon the usury, must be made in that suit, or the decree will conclude the right. But if the *original contract*, evidenced by the mortgage notes, was not usurious, the *subsequent payment of usury upon it* has no legal connection with it ; and the amount so paid may be recovered back in an action for money had and received, notwithstanding a decree of foreclosure may have been obtained, without any allowance for the usury so paid.

ASSUMPSIT for money had and received. Plea, the general issue, and trial by the court, June Term, 1846.—ROYCE, J., presiding.

On trial the facts appeared as follows. On the sixth day of February, 1841, the plaintiff gave to the defendant his note for \$50,00, payable the first of January next ensuing, with interest ; and on the ninth day of March, 1842, he paid to the defendant six dollars, for which the defendant endorsed on the note “one year’s interest.” The defendant also held another note against the plaintiff, dated

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October 29, 1839, for \$104,00, payable in one year from date, with interest; on which was endorsed, October 15, 1840, "one year's interest,"—and October 16, 1841, "one year's interest and \$18,00 on the principal." At the time this last endorsement was made the plaintiff paid to the defendant thirty dollars. On the 17th day of March, 1842, the plaintiff substituted for these notes a new note for \$173,10, and gave a mortgage deed, to secure its payment, upon which a decree of foreclosure was afterwards obtained, for the full amount appearing due upon the face of the note; and the mortgaged premises were redeemed by payment of that amount.

The court found, that three dollars was paid, March 9, 1842, as usurious interest upon the note for \$50,00, and that six dollars was paid, October 16, 1841, as usurious interest upon the note for \$104, and rendered judgment for the plaintiff to recover the sum of nine dollars, and interest from the time of payment. It did not appear, that the plaintiff had demanded of the defendant the money so paid, prior to the commencement of this suit. Exceptions by defendant.

S. B. Colby and C. W. Prentis for defendant.

The county court erred, in not treating the decree in chancery upon the last note as a bar to this action. *Bearce v. Barstow*, 9 Mass. 45. *Thatcher v. Gannon*, 12 Mass. 268. The last note having been given on settlement of the first notes, and substituted for them, it is a continuation of the same transaction; and usury paid on the second security was allowed to be recovered in a declaration on the original contract. *Collins v. Roberts*, Brayt. 235. *Bridge v. Hubbard*, 15 Mass. 96. And the county court having found, that usurious interest was paid on the first notes, they became usurious. 15 Mass. 96. The payment of usury is evidence of an agreement to that effect. 1 Saund. R. 431, n. 1 Str. 498. *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow. 715. The original notes being usurious, the last note became so; and the plaintiff might have made the usury a defence, *pro tanto*, to the suit in chancery;—and not having done so, he is concluded.

J. Cooper for plaintiff.

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The opinion of the court was delivered by REDFIELD, J. The only question, in the present case, is, whether the plaintiff is concluded by the decree of foreclosure from recovering the usury paid upon the notes included in the decree. We have examined the subject, both in this case and that of *Day v. Cummings*, *ante*, page 496; and the result of that examination is a very full conviction, that the plaintiff, upon the facts found in the case, is entitled to recover.

From this case it does not appear, that the original contract was usurious. And we cannot *presume* that it was. The subsequent payment of usury, under any state of the law, will not *infect* the *original contract*. And had those notes been sued, they could not have been defended, under any state of usury laws before known in this state, upon the ground of the payment of usury subsequent to the giving of the note, and not in pursuance of the original contract. If, then, the notes given up were perfectly valid, and might have been enforced at law, so, also, was the substituted note, which was given simply for the old notes, not including usury.

And although, when the defendant brought his bill to foreclose, the plaintiff might, by way of answer, have insisted upon the usurious payments, as equitable grounds for reducing the amount of the decree,—as is said in *Ward v. Sharp*, 15 Vt. 118,—still the defendant was not bound to make the defence there; and if made, it is rather in the nature of an equitable offset, than of a technical payment. If the usury is included in the notes, which constitute the basis of the decree, then the defence *must* be made there, or the judgment will conclude the right. But that is upon the ground, that, *when the usury is included in the security*, it is not considered as paid, until the entire sum secured is paid; or rather, the first payments will go in extinguishment of the sum loaned, and the legal interest; and so the judgment upon the security, *for the last dollar only*, settles the right to retain the usury. So, too, money paid in obedience to a decree or judgment of court, is not, and cannot be esteemed, an *unlawful* payment. So, too, the judgment upon the security for the whole, or any part, of the money secured, *settles conclusively the validity* of the contract; and no recovery back can subsequently be had, which goes upon the ground of its *invalidity* and *illegality*.

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But when, for aught which appears, the contract was not originally tainted with usury, and when no such taint enters into its renewal, the payment of money, as usury, *eo nomine*, is the consummation of an unlawful payment and may be recovered back, whether the debt is paid, or not. It has no legal connection with the original contract or security whatever, and the right to retain it is in no way affected by any proceedings had in regard to the original security. See the following cases, as tending to confirm the views here taken. *Smith v. Bromley*, Doug. 697, n. *Dey v. Dunham*, 2 Johns. Ch. R. 191. *Johnson v. Johnson*, 11 Mass. 359. *Gaither v. Bank of Georgetown*, 1 Pet. 43. *Simpson v. Warren*, 15 Mass. 460. *Commonwealth v. Frost*, 5 Mass. 53. *Thatcher v. Gammon* 12 Mass. 268. *Scurry v. Freeman*, 2 B. & P. 381. The mere taking security for usury is not the offence, but the *payment* of it. *Thomes q. t. v. Cleaves*, 7 Mass. 361. And whenever the usury, *eo nomine*, is paid, the right to recover the excess is perfect, notwithstanding the debt may never be paid. *Lloyd v. Williams*, 3 Wils. 250. S. C., 2 Bl. R. 792. *Wade q. t. v. Wilson*, 1 East 195.

Judgment affirmed.



JOSEPH OWEN, JR., v. DAN GRAY, ZD., and SILAS WHEELER, JZ.,
Trustee.

The exemption from attachment and levy of execution, contained in chap. 42, sec. 18, of the Revised Statutes, of "such military arms and accoutrements as the debtor is required by law to furnish," is of a temporary character, as applied to the individual, to continue so long as the debtor is bound by law to furnish them; and when the obligation ceases, the exemption in the particular case ceases.

Where it appeared from the disclosure of a trustee, that he had in his possession certain military accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously absconded from the state, it was held, that he had ceased to be an officer, in

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consequence of his removal from the state, and that he was no longer under obligation to furnish these military accoutrements, and that consequently the statute exemption, as to him, had ceased, and that the trustee should be helden chargeable for the articles.

TRUSTEE PROCESS. It appeared from the disclosure of the trustee, that he had in his possession certain military arms and accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously absconded from the state. The trustee also claimed, that the plaintiff had previously commenced a suit against him, as trustee of the principal debtor, and that a judgment had been rendered therein.

The county court, June Term, 1846,—ROYCE, J., presiding,—decided, that the trustee was chargeable for the property in his hands. Exceptions by trustee.

J. Cooper, for trustee, cited *Parks et al. v. Hadley & Tr.*, 9 Vt. 320; *Adams v. Newell & Tr.*, 8 Vt. 190; Rev. St. 240, § 13, art. 1-4; *Leavitt v. Metcalf*, 2 Vt. 342; and *Haskill v. Andros*, 4 Vt. 609.

— — — — —, for plaintiff, insisted, that Gray, having absconded from the state, could not be considered as coming within the exemption in the Revised Statutes.

The opinion of the court was delivered by

KELLOGG, J. It is now objected by the trustee, to the judgment of the court below, that the articles of property in his hands, belonging to the principal debtor, are not subject to attachment; and consequently not liable to the trustee process.

This objection is founded upon the 13th section of chapter 42 of the Revised Statutes, which exempts from attachment and execution "Such military arms and accoutrements as the debtor is required by law to furnish;" and the cases of *Parks et al. v. Hadley & Tr.*, 9 Vt. 320, and *Adams v. Newell & Tr.*, 8 Vt. 190, are cited as authorities, to show that the property disclosed by the trustee in the present suit is not liable to the trustee process. Those cases are clearly distinguishable from the case at bar. The case of *Parks et al. v. Hadley & Tr.* establishes the general proposition, that personal prop-

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erty, exempted from the levy of execution, is not to be held in the hands of a trustee. The property sought to be charged by the trustee process consisted of household furniture. The case of *Adams v. Newell & Tr.* decides, that the money of a pensioner, in the hands of his agents, is not liable to the trustee process. These are cases of permanent exemptions of property from attachment, and apply to all persons, who may hold the same.

But in the case of military arms and accoutrements the law limits the exemption to such, as the "debtor is by law required to furnish." This, we apprehend, is an exemption of a temporary character, as applied to the individual, to continue so long as the debtor is bound by law to furnish them, and that, when the obligation ceases, the exemption in the particular case ceases. Such we believe to be the obvious meaning of the statute.

The question then arises, was the debtor, Gray, at the time Wheeler was adjudged his trustee, bound by law to furnish these articles? At that time Gray had absconded and left the state. His authority as an officer had ceased. The office of adjutant of the regiment was vacated by his removal from the state; and Gray, having ceased to be an officer, ceased to be under obligation to furnish these military arms and accoutrements, and consequently the statute exemption as to him ceased. The articles were therefore liable to the trustee process.

It is farther urged, that the plaintiff's cause of action was merged in a prior judgment, and that consequently the present suit should be barred. It is not necessary to enquire what would be the effect of such a fact, if it existed and were properly pleaded to the action, or whether the trustee could avail himself of such a defence, inasmuch as we are unable to discover any evidence in the case of the existence of such fact.

The judgment of the county court is affirmed.

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ROBERT H. IVES v. ELIJAH G. STRONG.

The principle, decided in the case of *Kidder v. Barker*, 18 Vt. 454, recognized and affirmed.

This was an action upon the case against a sheriff, for neglect in not collecting and returning an execution against three debtors, running against the body and property of one of them, and against the property of the other two. The defendant offered to prove, in mitigation of damages, that the debtor, against whose body and property the execution was issued, was, during the entire life of the execution, without the precinct of the officer, in Canada, and that no one of the debtors in the execution had any property, but they were absolutely bankrupt, that there was no *bail* on the original writ, in the action in which the execution issued, and no property attached, and that the plaintiff had not been damaged;—and it was held, that the evidence should have been received, and that, if true, the plaintiff was only entitled to recover nominal damages.

TRESPASS ON THE CASE against the defendant, as sheriff, for the neglect of his deputy, Samuel S. Kimball, in not collecting and returning an execution in favor of the plaintiff against Alpha Allyn, Anne Allyn and Jonathan Briggs. Plea, the general issue, and trial by jury, December Term, 1845,—ROYCE, J., presiding.

It appeared, that the execution was issued against the body and property of Alpha Allyn, and against the property of the other two execution debtors. A question was made as to the regularity of the execution;—but as it was not decided by the supreme court, the evidence upon that point need not be detailed. The defendant offered to prove, in mitigation of damages, that Alpha Allyn, during the whole life of the execution, was without the precinct of the officer, in Canada, and that no one of the debtors in the execution had any property, but that they were absolutely *bankrupt*; that there was no *bail* upon the original writ, in the action in which the execution issued, and no property attached; and that the plaintiff had not been damaged. To this evidence the plaintiff objected, and it was excluded by the court.

Verdict for the plaintiff, for the full amount of the execution, with interest from the time of the commencement of this suit. Exceptions by defendant.

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T. P. Redfield for defendant.

It is well settled, that, in an action against the sheriff for an *escape*, the plaintiff is limited to his *actual damages*, and the insolvency of the debtor is competent evidence. Rev. St. 455, § 13. *Treasurer of Vt. v. Weeks*, 4 Vt. 215. In an action on the case the usual rule of law requires the plaintiff to *allege* and *prove* his damages; yet in this case the plaintiff claims to recover damages, where none have been sustained. It is true, this court have held, in *Turner v. Lowry*, 2 Aik. 72, and in *Hall et al. v. Brooks*, 8 Vt. 485, that the plaintiff should recover the full amount of his execution;—but in the first case the ground of the decision seems to have been, that the plaintiff had lost his lien upon the *bail* by the neglect of the officer; and in the latter case the court seem to lay stress upon the fact, that the debtor was within the precinct of the sheriff, and the sheriff wilfully refused and neglected to execute the precept. But in the case at bar it was impossible for the sheriff to execute the precept, as commanded; and the ground of action is simply a non-return. What would have been the rule of damages, if the debtor had died, or had been sentenced to state's prison, or transported beyond seas, or—which is this case—had expatriated himself? Rev. St. 75, §§ 21, 22. 15 Johns. 454.

E. Paddock for plaintiff.

The phraseology of the Revised Statutes, as to the liability of a sheriff for not returning an execution, is the same with that of the statute of 1797; and our courts have uniformly adjudged, that the amount of the execution and interest should be the rule of damages. Tol. St. 312, § 10. Slade's St. 203, § 10. Rev. St. 75, § 21. The execution debtor might have been out of the state during the life of the execution by connivance with the officer; neither that fact, nor the poverty of the debtors, prevented the officer from returning the execution. In relation to the rule of damages *Turner v. Lowry*, 2 Aik. 72, may be regarded as a leading case, as it reverses *Stevens v. Adams*, Brayt. 29. And see, to the same effect, *Hall et al. v. Brooks*, 8 Vt. 485, and *Watkinson v. Bennington*, 12 Vt. 404.

Nye et al. v. Kellam.

The opinion of the court was delivered by **DAVIS, J.** The recent case of *Kidder v. Barker*, 18 Vt. 454, recognizing an exception to the well established rule in this state, that, in actions on the case against sheriffs for not collecting or returning final process, the plaintiff is entitled to recover the full amount of the execution, must control the present case. The two cases are almost precisely the same,—at least so far as respects Alpha Allyn, the principal execution debtor. Assuming the facts, offered to be proved in respect to the other two debtors, to be true, as we must for the present purpose, there can be no question, but that the whole case falls within the admitted exception. The testimony offered in the county court, and excluded, should have been received.

As this opens the case for trial, it becomes unnecessary to pass upon the objection raised against the regularity of the execution.

The judgment of the county court is reversed, and the case remanded for trial, unless the plaintiff consents to take a judgment for nominal damages and costs; in which case the judgment, so modified, will be affirmed, with costs to the defendant in this court, to be deducted from the plaintiff's costs.

The plaintiff's counsel declined taking a judgment for nominal damages, and the case was remanded.



GEORGE NYE and LUCIUS S. NYE v. SABIN KELLAM.

[Same Case, 18 Vt. 594.]

It is no defence to an action against a sheriff for not levying and returning an execution, that it had been agreed between the plaintiff and the execution debtor, that the balance due upon the execution should be charged to the execution debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies, without evidence that the amount had been actually paid, or adjusted, by a settlement of the current account embracing it.

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TRESPASS ON THE CASE against the defendant, as sheriff, for the default of his deputy, John Locke, in not levying and returning an execution in favor of the plaintiffs against Charles M. Cowles. Plea the general issue, and trial by jury, June Term, 1846,—ROYCE, J. presiding.

It appeared, that the execution in question was delivered to Locke September 25, 1840; and the defendant offered to prove, that in March, 1842, an arrangement was entered into between the plaintiff George Nye and the execution debtor, Cowles, that the balance due upon the execution should "go in account between them." To this evidence the plaintiff objected; but it was admitted by the court;—and this was all the evidence upon this point.

The court instructed the jury, that, if they should find that the execution had not been fully paid by Cowles to the plaintiffs, or one of them, the plaintiffs would be entitled to a verdict for the balance, unless there was an agreement between Cowles and the plaintiffs, or George Nye, that the balance should be transferred to the account of Cowles, and adjusted with their other debt, and that agreement mutually understood to be in discharge of all other liabilities and remedies;—but that, if they should find such an agreement was made, and that such an effect was mutually intended by it, then they would be at liberty to return a verdict for the defendant, on the ground of payment, or satisfaction, of the execution by Cowles to the plaintiffs.

Other points were made upon the trial and argued by the counsel; but no decision was made upon them by the supreme court. —

Verdict for defendant. Exceptions by plaintiffs.

J. Cooper and T. P. Redfield for plaintiffs.

The arrangement between Cowles and George Nye was without consideration and void. It is but the common case of accord without *satisfaction*,—which has been uniformly held to be no discharge of the existing liability. *Bates v. Starr*, 2 Vt. 536. *Bryant v. Gale*, 5 Vt. 416. Smith's Leading Cases, Tit. "Accord and satisfaction."

C. W. Prentiss for defendant.

It was competent for one of the plaintiffs to control the execution, or to receive the pay upon it and give a discharge, or to settle

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it by its going into account ; and the charge of the court upon this point was clearly correct.

The opinion of the court was delivered by DAVIS, J. This case came before this court on exceptions at the last term ; when, after a verdict and judgment for the plaintiff, a new trial was granted. 18 Vt. 594. It now comes before us, in the same manner, after a verdict and judgment for the defendant. The only point, upon which it is now necessary to pass, involves the admission, by the court, of evidence intended to show, that, after the sheriff had become liable for the default of his deputy, Locke, an arrangement had been entered into between one of the plaintiffs and the original debtor in the execution, Cowles, to the effect that whatever balance might be due on the execution should be passed in account between the parties, and the subsequent charge of the court in reference to that evidence. The charge, in substance, was, that, if they found it was agreed that such balance should be transferred to the account of Cowles, and adjusted with their other debt, and that agreement mutually understood to be in discharge of all other liabilities and remedies, the jury would be at liberty to regard this as payment, or satisfaction, of the execution.

We think the ruling of the court, in admitting this evidence, unaccompanied by evidence to show that this balance had been actually paid or adjusted by a settlement of the current account embracing it, was erroneous ; as was also the charge embodying the same principle. A mere executory agreement to pay the execution in that form could have no other legal effect, than an unexecuted agreement to pay it by the execution, or indorsement, of a promissory note, or the acceptance of a bill, or even a naked promise to pay the money at a future day. Such agreements can never be relied upon as satisfaction. They must be pleaded in bar of the original liability ; nor do they present a distinct ground of action in themselves.

It is obvious, that such an item would constitute no proper subject of book charge ; the arrangement could not be enforced in that form ; besides it is without consideration, and would fail on that ground. Should this defence be allowed to prevail, the plaintiffs would be without legal remedy for the balance due them, unless their debt-

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or should voluntarily consent to account for it on settlement. See *Bryant v. Gale*, 5 Vt. 416, where the subject of accord and satisfaction was quite fully considered. The defence set up there, and which was allowed to prevail, was a new contract under seal, to accept a horse, if delivered by a certain time, in satisfaction of the several promises mentioned in the declaration. The case turned entirely upon the circumstance, that the substituted contract was under seal.

The judgment of the county court is reversed, and a new trial ordered.

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DAVID S. ABBOTT v. SAMUEL S. KIMBALL AND SAMUEL JEWETT.

Where property, attached upon mesne process, is sold by the attaching officer, a deputy sheriff, upon the writ, in pursuance of the Revised Statutes, chap. 28, §§ 48-52, and judgment is finally rendered in favor of the defendant, in the action in which the attachment was made, a refusal, on the part of the officer, to pay to the defendant the amount, for which the property was sold, will not render him a trespasser *ab initio*, so as to render him liable in trover for the property.

The only proper action against the deputy, in such case, is for money; and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer.

And if the deputy, in such case, made the sale without notifying the defendant in that action, this would not make the attaching creditor jointly liable with the deputy, in any way, unless he did something more than request a sale. The mere joining with the deputy in a special plea, where they have been sued jointly in trover for the property, when there is also a general several plea upon the record, will not involve the creditor with the officer, nor excuse the court from giving proper instructions to the jury, as to all the points in the case, as to both defendants, *considered separately*, whether particularly requested upon all the points, or not.

Trespass on the case, for any mere non-feasance of the deputy, will only lie against the sheriff.

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An attaching creditor can in no case be held jointly liable with the officer, for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it.

Where property has been attached, and final judgment is rendered in favor of the defendant in the suit in which the attachment was made, *trover* will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property attached.

In order to sustain an action for an excessive attachment of property upon a writ, the plaintiff must allege and prove much the same, that he would in a suit for a malicious action,—that is, want of probable cause and malice express;—and the attaching creditor will ordinarily be the only person liable to such action.

THIS was originally an action of trover for four horses and five harnesses. After judgment for the plaintiff and review by the defendants, the plaintiff, by leave of the court, amended his declaration by filing several additional counts in case. In the first count the plaintiff alleged, that on the 25th day of November, 1842, the defendant Jewett and one Strong, then his partner, but since deceased, sued out their writ of attachment against the plaintiff, demanding, as damages, sixty dollars, and commanding the sheriff to attach the property of the plaintiff to the value of eighty dollars, and delivered the said writ to the defendant Kimball, a deputy sheriff, to serve and return, and that Kimball attached thereon five harnesses and four horses belonging to the plaintiff; that such proceedings were had in that suit, that the plaintiff, Abbott, recovered final judgment therein, in his favor; and the plaintiff averred, that it was the duty of the defendants to have carefully kept and preserved the said harnesses,—but that, in fact, they had neglected to keep them with care, but had suffered them to become rotten and worthless.

In the second count the matter of inducement was the same; and the plaintiff alleged, that Kimball, after he had served and returned the writ against the plaintiff, by the direction and procurement of Jewett, sold the four horses attached for the sum of sixty two dollars, and that this was done without the knowledge or consent of the plaintiff, Abbott, and that, after final judgment had been rendered in favor of Abbott in that suit, he demanded the horses of the defendants,—but that they had refused to deliver them to him, or to pay him their value, or to pay him the sum for which they were

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sold. In the third count the matter of inducement was substantially the same; and the plaintiff averred, that the property was attached by Kimball, by the direction of Jewett, and that its value was very much larger, (at least five times larger,) than the whole amount which Jewett and Strong claimed to recover in that suit, and that so great an amount of property was taken for the purpose of embarrassing the plaintiff and putting him to great expense and trouble.

The defendants pleaded the general issue, and also pleaded specially, setting forth the facts in reference to the suit in favor of Jewett and Strong against the plaintiff, as alleged in the declaration, and then averring, that, after the attachment, the plaintiffs in that suit applied to the defendant Kimball to sell the horses, in pursuance of the statute; that Kimball notified Abbott of this application, and then caused the horses to be appraised, and sold them for \$62,00, pursuing in all respects the requisitions of the statute,—Rev. St. chap. 28, sec. 48-52,—describing particularly the steps taken; that the expenses of keeping and selling the horses amounted to \$20,54; and that, after final judgment had been rendered in that suit in favor of Abbott, Kimball tendered to Abbott the amount for which the horses were sold, deducting the said sum of \$20,54, and delivered to him the harnesses,—having safely and properly kept them. The plaintiff replied, traversing all the facts alleged in the plea.

Trial by jury, December Term, 1845,—Royce, J., presiding.

On trial the plaintiff gave in evidence the files and records in the original suit against him in favor of Jewett and Strong; and also gave evidence tending to prove, that, soon after final judgment had been rendered in his favor in that suit, he demanded of the defendants the horses, or the amount at which they had been appraised, and the harnesses; and that the defendants then offered to the plaintiff the amount for which the horses had been sold, deducting the expenses of keeping and sale, and also offered to the plaintiff the harnesses,—all which the plaintiff refused to receive. The plaintiff also gave evidence tending to prove, that the harnesses had not been carefully kept by Kimball after they were attached, and that they had thereby become greatly reduced in value.

The defendants then gave evidence tending to prove all the facts alleged in their plea in bar, and also, that Kimball had not been guilty of any want of ordinary care in keeping the harnesses.

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The court instructed the jury, that, if the defendants had proved all the facts alleged in their plea in bar, the sale of the horses by Kimball was a legal sale, under the statute, and that, in that event, they would return a verdict against both defendants for the sum for which the horses were sold by Kimball, with interest from the time of the demand, and that Kimball had no legal right to deduct from that amount either the expenses of keeping the horses before the sale, or the costs of the sale;—that, if the jury did not find all the facts alleged in the plea substantially proved, especially the alleged notice, from Kimball to the plaintiff, that application had been made to him to have the horses appraised, &c., under the statute, (which was the only contested fact alleged in the plea in relation to the horses,) they would then consider the original declaration in trover supported in regard to the horses, and would return a verdict in favor of the plaintiff for the value of the horses, with interest from the time of the sale by Kimball, and that they would be at liberty to adopt the appraisal as evidence of the value, if they thought proper;—that, if they found that the harnesses had been kept by Kimball, after the attachment, with ordinary prudence and care, and that they had not depreciated in value from the want of such care, then the plaintiff could not recover any thing for the harnesses; but that, if they found that Kimball had not kept and preserved the harnesses with such care and prudence, they should add such sum to their verdict, as they found the harnesses had depreciated in consequence of the want of such care and prudence;—and that, if they found that the attachment of property, made by Jewett and Strong upon their writ against Abbott, was unreasonable and extravagant, in reference to the amount of their claim against him, and made with a view to perplex and harrass him, they could add to their verdict such sum, as they should consider the plaintiff had suffered from the excessiveness of the attachment.

The jury returned a verdict against both defendants for \$171,00; and after verdict the defendants moved in arrest of judgment for the insufficiency of the plaintiff's declaration. The court overruled the motion and rendered judgment for the plaintiff upon the verdict. Exceptions by defendants.

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***Poland* for defendants.**

I. If the jury found, that Kimball gave no notice to the plaintiff of the application of Jewett and Strong to have the horses sold, that would give the plaintiff no right to maintain any action against Jewett. The property was in the custody of Kimball, the officer, and Jewett had a legal right to apply to him to have it sold; and if, in the course of the proceedings, the officer was guilty of any error, or omission of duty, Jewett is not responsible therefor. *Barnard v. Stevens et al.*, 2 Aik. 429. It may be said, that, as the defendants joined in a plea of justification, and that failed as to one, it failed as to the other, also; but in this case the general issue was also pleaded, and all the evidence was equally applicable to that issue,—which is always several.

II. If the sale of the horses was regular and legal, the defendants contend:—

1. That no action sounding in *tort* can be sustained,—that if the officer, upon the termination of that suit in favor of the defendant therein, refused to pay over the avails of the property to him, the remedy must be in form *ex contractu*:—

2. That, at all events, Jewett is not liable. The property was legally attached, and was disposed of under the statute; so that no action can be sustained for that. The officer holds the money, until the suit is terminated in favor of the defendant; and the plaintiff in that suit, who never had, and was never entitled to have, the custody of that money, can in no manner be held liable for it. The statute,—Rev. St. 185, § 46, provides, that “the proceeds of the sale, after deducting the necessary charges thereof, shall be held by the officer, subject to the attachment, or attachments, and shall be disposed of in like manner, as the same property would have been held and disposed of, if it had remained unsold;” and section fifty of the same chapter, which governs this case, provides, that “the proceeds thereof shall be held and disposed of in the manner before provided in case of a sale by the consent of the parties, unless” &c. If, then, the sale be according to the directions of the statute, the *proceeds* have taken the place of the horses, and the accountability of the officer is the same, as for the property itself, if it had remained in his hands. *Adams v. Abbott*, 2 Vt. 383.

III. The officer had a right to deduct, from the sum for which

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the horses were sold, the expenses of the keeping and the charges of the sale. While the property was under attachment in the officer's hands, the defendant was bound to pay the expenses of keeping; and if he would avoid this, he should either replevy it, or have it received. *Dean v. Bailey*, 12 Vt. 142. *Jackson v. Scribner*, cited in Ib. At all events, the officer is entitled to deduct the *charges of the sale*; for such is the express language of the statute.

IV. If Kimball neglected to take proper care of the harnesses, while under attachment, this, being a mere non-feasance, would not make him a trespasser *ab initio*. And Jewett can in no way be made liable for this neglect; for he had nothing to do with the harnesses after the attachment.

V. The third count added to the declaration, for making an excessive attachment, is fatally defective.

1. There is no allegation of malicious motive in Jewett.
2. It is not alleged, that the property was removed from the plaintiff's possession by the defendants, or either of them.
3. There is no allegation of damage in any manner.

J. Cooper for plaintiff.

The jury were correctly instructed, that, if the facts alleged in the plea in bar were found substantially true, the plaintiff was entitled to recover against both defendants.

The case shows, that the plaintiff demanded the horses, or their appraised value, of the defendants,—not of one of them,—and that the defendants made a tender of the avails of the sale, after deducting the expenses of keeping and selling. These were acts of the defendants jointly, for Jewett's benefit; for he was liable for the expenses. *Johnson v. Elson*, 2 Aik. 299. *Felker v. Emerson*, 17 Vt. 101. It makes no difference in principle, that Jewett chose to have the property sold, under the statute. The statute does not change the rights of the parties, by divesting the defendant of his property, when attached, provided he should eventually recover. The property was absolutely discharged by the judgment, and Jewett was bound to pay the sheriff's expenses. *Felker v. Emerson*, 17 Vt. 101. The act of applying the proceeds of the sale for this purpose was for Jewett's benefit, and he participated in it. This makes him guilty of a legal conversion. 3 Stark, Ev. 1500. No claim

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appears to have been made in the court below, that, if one of the defendants was liable, both were not liable; and the question should not be entertained here, unless it appears that it was distinctly passed upon in the court below. *Barnard v. Stevens et al.*, 2 Aik. 429. 2 Vt. 383. In the case of *Lamb v. Day et al.*, 8 Vt. 407, this question was presented; and it would seem, that that was a stronger case for the defendant Day, than this is for Jewett. In this case it does appear, affirmatively, that Jewett did intermeddle with the property after the attachment; and even when the property was demanded, he did not deny having the control of the matter. In this particular this case differs from that of *Adams v. Abbott*, 2 Vt. 383.

The last count in the declaration states sufficiently a cause of action; it has been traversed and a verdict has passed; and no substantial reason appears, why the judgment upon the verdict should not be affirmed. *Battles v. Braintree*, 14 Vt. 348. Arch. Pl. 163. 1 Salk. 365.

The opinion of the court was delivered by

REDFIELD, J. There are numerous points in this case, upon some of which the court are not fully agreed. But having no difficulty in reference to many, we think it best to determine those.

1. The court charged the jury, that although the defendants made out all the facts alleged in their plea in bar, still the plaintiffs might recover, *in this form of action*, the amount of money for which the horses were sold, and interest from the time of the demand. No doubt, if the officer had no right to deduct the expenses of keeping and sale,—of which we say nothing, (not being agreed fully,—) the *officer* might be liable, in some form of action, for that amount. But it seems to us,—1, That in that case the officer is not liable *in trover*. A refusal to pay over the money, or claiming to retain part of it, upon grounds which are not well founded in law, will not make him a trespasser *ab initio*. And unless that is the case, *trover* will not lie, *even against the officer*. It is like any other refusal to pay over money in his hands. 2. That *trespass on the case*, for any mere *non-feasance* of the deputy, will only lie against the sheriff,—this never being sufficient to make him a *tort-feasor ab initio*. 3. That in no case can the creditor be jointly liable for any wrong of the officer, unless he in some way participated in it, or rati-

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The court instructed the jury, that, if the defendants had proved all the facts alleged in their plea in bar, the sale of the horses by Kimball was a legal sale, under the statute, and that, in that event, they would return a verdict against both defendants for the sum for which the horses were sold by Kimball, with interest from the time of the demand, and that Kimball had no legal right to deduct from that amount either the expenses of keeping the horses before the sale, or the costs of the sale;—that, if the jury did not find all the facts alleged in the plea substantially proved, especially the alleged notice, from Kimball to the plaintiff, that application had been made to him to have the horses appraised, &c., under the statute, (which was the only contested fact alleged in the plea in relation to the horses,) they would then consider the original declaration in trover supported in regard to the horses, and would return a verdict in favor of the plaintiff for the value of the horses, with interest from the time of the sale by Kimball, and that they would be at liberty to adopt the appraisal as evidence of the value, if they thought proper;—that, if they found that the harnesses had been kept by Kimball, after the attachment, with ordinary prudence and care, and that they had not depreciated in value from the want of such care, then the plaintiff could not recover any thing for the harnesses; but that, if they found that Kimball had not kept and preserved the harnesses with such care and prudence, they should add such sum to their verdict, as they found the harnesses had depreciated in consequence of the want of such care and prudence;—and that, if they found that the attachment of property, made by Jewett and Strong upon their writ against Abbott, was unreasonable and extravagant, in reference to the amount of their claim against him, and made with a view to perplex and harrass him, they could add to their verdict such sum, as they should consider the plaintiff had suffered from the excessiveness of the attachment.

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Abbott v. Kimball et al.

Poland for defendants.

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II. If the sale of the horses was regular and legal, the defendants contend :—

1. That no action sounding in *tort* can be sustained,—that if the officer, upon the termination of that suit in favor of the defendant therein, refused to pay over the avails of the property to him, the remedy must be in form *ex contractu* :—

2. That, at all events, Jewett is not liable. The property was legally attached, and was disposed of under the statute; so that no action can be sustained for that. The officer holds the money, until the suit is terminated in favor of the defendant; and the plaintiff in that suit, who never had, and was never entitled to have, the custody of that money, can in no manner be held liable for it. The statute,—Rev. St. 185, § 46, provides, that “the proceeds of the sale, after deducting the necessary charges thereof, shall be held by the officer, subject to the attachment, or attachments, and shall be disposed of in like manner, as the same property would have been held and disposed of, if it had remained unsold;” and section fifty of the same chapter, which governs this case, provides, that “the proceeds thereof shall be held and disposed of in the manner before provided in case of a sale by the consent of the parties, unless” &c. If, then, the sale be according to the directions of the statute, the *proceeds* have taken the place of the horses, and the accountability of the officer is the same, as for the property itself, if it had remained in his hands. *Adams v. Abbott*, 2 Vt. 383.

III. The officer had a right to deduct, from the sum for which

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the set-off. The note, then, was due to Hart and from Blake and McIntyre. The account was due from Hart,—that is, it was *ultimately his debt to pay*;—so also, of the other notes. The case of *Ferris v. Burton*, 1 Vt. 439, is, also, a full authority for this decision.

The only difficulty, which this case has ever seemed to present, has arisen from the repeated declarations of judges and elementary writers, that, in regard to set-off, *courts of equity follow the same rules as courts of law*, and no more in the one case, than the other, can *joint and separate debts be set-off against each other*. To prevent future misapprehension and the necessity of going over this whole ground at every successive application of this kind, it may be proper to examine this subject somewhat more at length, than would otherwise seem necessary.

1. It is, I suppose, admitted on all hands, that courts of equity did exercise a jurisdiction upon this subject, before the statutes of set-off existed; and consequently the jurisdiction is not based upon any statutes of set-off, and would exist as well without any such statutes as it now does, and would not be in any sense affected by the repeal of those statutes. *Ex parte Stephens*, 11 Ves. 24. *Ex parte Blagden*, 19 Ves. 465. *Hawkins v. Freeman*, 2 Eq. Cas. Abr. 10, pl. 10.

2. The writers upon English law seem to admit,—and that seems to be the sound reason, resulting from inference and presumption,—that the English statutes of set-off, the 2d of Geo. II and 5th of Geo. II, in relation to bankrupts, and some subsequent statutes, were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides. 14 Petersd. Ab. (417) 301, and note. The general statute of set-off of 2 Geo. II is restricted to *mutual debts*; while that in regard to bankrupts extends to *mutual credits*. In regard to the latter statute, the administration of which is almost altogether under the supervision of the court of chancery, they have exercised both an equitable and legal jurisdiction. That we will examine.

3. If the court of chancery in England continued to exercise any jurisdiction, in regard to this subject, after the passing of the statute, it is reasonable to suppose they would only interfere in those cases,

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which did not properly come within the powers of the courts of law. How much they would go beyond the limits, which courts of law had prescribed for themselves, would, as in other cases, depend upon their own discretion; and this discretion would, as in other cases, also depend a good deal upon the special circumstances of particular cases. Such, upon examination, we find to be the fact in regard to the set-off which the English chancery has allowed in bankrupt cases.

At law, it is well understood, the parties upon the record, only, will be regarded in allowing a set-off; and the *nominal* parties must, consequently, be the *same*. But equity regards the real parties,—the parties ultimately to be affected by the decree. In the case of *Ex parte Quinten*, 3 Ves. 248, it seems to me the court go farther, than what a proper regard to the embarrassments attending similar inquiries in many cases would require or justify. But the case was evidently decided upon its particular equity. In that case a debt was actually divided, and a portion of it set off, according to the equitable rights of the parties. That is farther than courts of equity have often gone, I admit; but I confess, that, under similar circumstances, I should be inclined to adopt the reasoning of Lord Loughborough in this case. He goes upon the ground, that "The *right* is manifest, the *equity* is a *clear* and a *strong* one." Courts of equity interfere, in cases of set-off, upon analogous grounds to those upon which their whole *preventive jurisdiction* is based,—that is, to *prevent irremediable injustice*. It is upon this ground, that one will be restrained by injunction from doing mischief to mines, shade trees, monuments, and in many such like cases, where compensation in damages is no *adequate remedy*. So, too, when one is pursuing an action at law, against which he has himself given a bond of indemnity, he will, to prevent circuity of action, be restrained by injunction.

It is upon these grounds, that I think, when the debts are *in reality mutual*, or to that extent, even, when the debt must be apportioned, and the party, attempting to enforce his claims at law in the name of some other party *but nominally interested*, is himself *insolvent* a, court of equity should and will interfere to prevent the injustice by decreeing the set-off. Such, as I understand, is the uniform

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course under the English bankrupt laws;—which are not broader than the statutes of set-off in this state.

The case of *James v. Kynnier*, 5 Ves. 108, is a full authority to the very point for which I contend. There was no pretence here, that there was any mutuality in the debts *at law*. Upon the most favorable view, it was setting off a separate debt against a joint debt, Lord Loughborough says, “I have not a particle of doubt upon this case, which is the clearest I ever heard.” The only equity, upon which the case rested, was, that the debts were in *reality* mutual *and an intervening insolvency*. *Ex parte Stephens*, 11 Ves. 24, is clearly a case of *equitable* set-off, “*where there could be none at law*,” as is said in the marginal note to the case. The note appended to the case of *James v. Kynnier* in Summer’s edition of Vesey, states the rule upon this subject very fairly;—“The doctrine of set-off, under the statute, must be the same at law as in equity; but the equitable jurisdiction on this subject prevailed long before the statute of Geo. II. And this difference seems established, namely, that a set-off, at law, must be founded on a strict case of mutual debt, or mutual credit; *but that a more extended construction may be made in equity.*” *Ex parte Blanden*, 19 Ves. 467. *Ex parte Flint*, 1 Swanst. 34. *Taylor v. Okey*, 13 Ves. 181. The case of *Hanson ex parte*, 12 Ves. 345–6, is the very case of setting off a separate debt against a joint debt, and upon equitable grounds merely.

The general rule undoubtedly is, in equity as well as at law, that joint and separate debts cannot be set-off against each other. Such is the language of all the cases and of all the writers upon the subject. But they almost all allow of a sweeping exception, and nearly in the same words,—“*under particular circumstances*;” *Ld. ELDON*, in 3 Meriv. 618, quoted with approbation by Chancellor KENT in *Dale v. Cooke*, 4 Johns. Ch. R. 13; Story on Part., § 395; 2 Story’s Eq. Jur., § 1432 *et seq.* The difficulty of *defining* these circumstances is hinted at by Justice Story, § 1437, thus,—“These are so various as to admit of no comprehensive enumeration.” These inquiries might be pursued very much farther. But when it is remembered, that, in almost all the cases where courts of equity have interfered to go beyond the statutes of set-off, it has been where there had intervened the insolvency of one or more of the parties, and that these

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are almost the only cases where the interference is of any importance, and that the cases thus far furnish no other ground for interfering, it is made sufficiently obvious, that these peculiar circumstances do not ordinarily occur, except in cases of insolvency. But beyond this, courts of equity have not generally gone.

But in looking into the subject of set-off, or *compensation*, as it existed in the civil law, where, upon suit being brought, all matters in dispute between the parties were to be adjusted, as much as in the case of a general submission to arbitrators,—I mean all matters of contract, whether liquidated or not, can we consider this, and how beneficial such a course would be to the parties, at least, one cannot but wonder at the great circumspection and reserve made use of in courts of equity upon this subject. The remarks of Mr. Justice Story, in 2 Eq. Jur. 36, § 1444, are just and forcible;—“The general equity and reasonableness of the ~~maximes~~, upon which the Roman superstructure is founded, make it a matter of regret, that they have not been transferred, to their full extent, into our system of equity jurisprudence.”

Enough has been said, I trust, to show that the present case comes clearly within the principles of equity, upon which this branch of equity law rests, and also far within the range of the decided cases, and to satisfy all, that courts of equity need not feel over-solicitous to restrict this portion of their remedial jurisdiction, which is so just and salutary in its operation, and so impossible of being abused, and which so universally obtains in all countries, whose jurisprudence is founded upon the Roman civil law.

Decree of the chancellor affirmed.

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IRA DAY v AVERY CUMMINGS.

IN CHANCERY.

A nominal party to a contract, who has assigned all his interest, is only required to be joined in any proceeding in equity, in regard to the contract, for the purpose of having the decree conclude his rights, and thus conclude all future litigation. So that, in all such cases, when the court of chancery can see, in the particular case, that there exists no necessity for the joinder of such party on that account, it will not be required,—especially after the case has gone to a hearing.

A nominal party to a contract, in regard to which a suit in equity is pending, who is so divested of all interest as not to be a necessary party to the bill, is a competent witness in the case.

Where usury has been paid upon a note, in pursuance of a contract made at the time of its execution, and the payee seeks afterwards to enforce the collection of the note by a suit at law, a court of equity, upon a bill brought by the maker of the note, will order that the sum so paid be allowed as a payment upon the note, computing simple interest.

But where usury has been paid upon notes, which have been subsequently put in suit, and judgments have been recovered upon them and satisfied in full, which judgments still remain unreversed, a court of equity will not interfere to relieve the party making such usurious payments.

Any defence, which might be interposed at law to defeat a recovery upon a contract, or a portion of it, must be so interposed, or it is concluded by the judgment.

It is in accordance with the usual equity practice, when a party seeks, in a court of chancery, to obtain relief against a portion of the amount due upon a contract attempted to be enforced against him at law, and is successful, to have the entire case finished in the court of chancery, so as to put an end to any further litigation between the parties in reference to the entire contract;—although there are many exceptions to this practice.

Where the orator alleged in his bill, that a former firm, of which he was a member, and of which he was now the sole representative in interest, had made payments to the defendant of usurious interest upon notes which the defendant was now seeking to enforce against the firm by a suit at law, and also alleged that he had himself paid usurious interest to the defendant upon a note given by him to the defendant in the course of his individual business, which note he had subsequently paid in full, and prayed that he might be allowed for the pay-

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ments so made, and the bill was not demurred to, nor objected to, in the court below, on the ground of multifariousness, it was held, that relief should be afforded the orator for all the payments so made, although, in strictness, it was involving distinct matters in the same bill.

In this case the orator was allowed his costs, having prevailed upon all the points litigated, excepting those from which he was precluded by a mere technical bar really shutting out the true equity of the case.

APPEAL from the court of chancery. The orator alleged in his bill, in substance, that from 1828 until 1842 he was a partner in business at Montpelier with Luther Cross; that in 1842 he purchased the interest of Cross in the property of the firm, and executed to him a bond, conditioned that he should pay all debts due from the firm; that during the continuance of the partnership the firm borrowed various sums of money of the defendant, for which they gave him their note, and for which they agreed to pay him interest annually at the rate of twelve *per cent.*; that towards such usurious interest they paid the defendant various sums of money, and gave him several notes, which notes the defendant had put in suit, and obtained judgments thereon, which had been fully paid and satisfied by the orator; that the defendant still held two notes, one for \$400,00, and the other for \$200,00, given by the firm during the existence of the partnership, upon which the firm had made various payments of usurious interest, and the collection of which notes the defendant was seeking to enforce by a suit at law, now pending in court; that the orator had also, in the course of his individual business, executed to the defendant his own note, signed by Cross as surety, for \$125,00, for a pair of oxen, upon which he agreed to pay the defendant interest annually, at the rate of twelve *per cent.*; and that he had paid this last note in full, including a large amount of usurious interest upon the same. And the orator prayed, that an account might be taken of the amount of usurious interest paid by him, or by the partnership, to the defendant, and that the defendant might be ordered to repay the same to the orator, or to allow the same upon the notes in suit, and for an injunction, and for general relief.

The defendant answered, denying that the firm ever agreed to pay him usurious interest, or that he ever received usurious interest

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from them; but admitting that he had received from the orator, upon the note for \$125,00, a small sum above the interest at the rate of six per cent.

The answer was traversed and testimony was taken. Luther Cross was examined as a witness on the part of the orator; and his testimony tended to sustain the allegations in the bill. It appeared that the writ, in the action at law upon the notes, in favor of the defendant, had been served by attaching the property of the orator; and that the orator had deposited with Cross \$800,00 in money, for the purpose of fully indemnifying him against any judgment which might be recovered against him in that suit. The defendant filed a motion to suppress the testimony of Cross. Other testimony was taken, the substance of which is sufficiently detailed in the opinion of the court.

It was referred to a master, to ascertain and report the sums paid to the defendant by Day and Cross as usurious interest upon the two notes in suit, and upon all other notes executed to him by the firm, excepting those notes upon which the defendant had recovered judgments. The master reported, that the amount of usurious interest paid to the defendant previous to the date of the note for \$400, excepting the payments upon the notes which had passed into judgments, was \$57,78; and that there was paid on the note for \$400, as usurious interest, September 1, 1838, \$24,00,—November 7, 1839, \$24,27,—and September 1, 1840, \$24,00.

The court of chancery,—REDFIELD, Ch.—decreed, that the sum of \$57,78 be applied upon the note for \$400,00, as a payment at its date, that \$24,00 be applied upon said note, as a payment made September 1, 1838,—\$24,27 as a payment made November 27, 1839,—and \$24,00 as a payment made September 1, 1840; that the claims of the orator for payments made upon the notes which had passed into judgments, and upon the note for \$125,00, signed by the orator, and by Cross as surety, should be disallowed; and that no costs should be allowed to either party. From this decree the defendant appealed.

J. A. Vail and L. B. Peck for orator.

O. H. Smith for defendant.

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The opinion of the court was delivered by

REDFIELD, J. In this case the orator seeks relief, in regard to notes in suit, at law, against himself and Luther Cross, who was his partner at the time the notes were given, but who has since assigned all his interest to the orator, and taken a bond to indemnify himself against all debts, and subsequently received a deposit of money amply sufficient to cover all damages and costs, which may by any possibility ever be recovered upon the notes. The bill alleges, that the notes were given for money borrowed upon usurious interest, and that upon those notes, and some others set forth in the bill, a large amount of usury had been paid.

1. It is objected, that Cross is a necessary party to this bill. I have no doubt he might, with perfect propriety, have joined as a co-plaintiff, upon the ground, merely, of being a party to the suit at law, and so legally interested, *prima facie*, to defeat the suit. This, in general, is necessary, in order to put a *quietus* upon the litigation. But courts of equity always exercise a discretion in regard to these *formal* parties, who are not in fact interested in the *event* of the litigation, and upon whom the decree is not intended to operate, by way of requiring them to do any *positive* act. Story's Eq. Pl. 147, § 153. 1 Daniels' Ch. Pr. 248, and note. At all events, a nominal party to the contract, who has assigned all his interest, is only required to be joined in any proceeding in equity, in regard to the contract, for the purpose of having the decree conclude *his rights*, and thus conclude all *future litigation*. So that, in all such cases, when the court of chancery can see, in the particular case, that there exists no necessity for the joinder of such party on that account, it will not be required,—especially after the case has gone to a hearing. And where the testimony of the assignor is taken, disclaiming all interest, as in the present case, the assignor will be concluded by such admission upon the record, and so by the decrees passed in faith of that admission. This was expressly decided in *McConnell v. McConnell*, 11 Vt. 290.

2. There is no pretence that Cross, at the time of the hearing, had any interest in the subject matter of this suit. If not a necessary party plaintiff then, he was a competent witness. And the testimony very clearly establishes the fact of the payment of usury, if

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pursuance of a contract made at the time of the loan. His testimony, too, is so far corroborated by the circumstances of the case, the *memoranda* upon the notes, and especially the *form* of the denial in the answer,—denominating the sums allowed, as “*discounts*,” and not as extra interest,—that we have no doubt it is sufficient to overcome the answer. The only difficulty we have found in this case has been in regard to the claims of the orator, which were disallowed by the court of chancery.

3. There was usury paid upon a note for one hundred dollars, which was indorsed down to fifty dollars. This note was subsequently sued, and went into judgment, and was paid upon the execution which issued. But the interest seems to have been paid by giving other notes, some payable to Cummings and one to another person; and these notes have also been sued and collected in the same way. All payments, which were ultimately made upon judgments and executions, were disallowed in the court below, as not being recoverable in any suit whatever, so long as these judgments remained in force. We are finally of opinion, that the judgment, or decree, was correct, in excluding these payments.

It has always been held, that any defence, which might be interposed at law to defeat the recovery, or a portion of it, must be so interposed, or it is concluded by the judgment;—and, at all events, that when the specific money, sought to be recovered back, was finally paid upon a judgment, the recovery cannot be had. *Thatcher v. Gammon*, 12 Mass. 268. *Steward v. Downer*, 8 Vt. 320. And the same principle is implied in all those decisions, where a warrant of attorney to confess judgment, and judgments confessed, upon usurious contracts, have been set aside upon that ground, or execution stayed, until that fact could be determined upon a feigned issue. That is the practice of the courts of law, in regard to all judgments entered upon warrants of attorney. *Richmond v. Roberts*, 7 Johns. 319. *Cooke v. Jones*, Cowp. 727. *Everitt v. Knapp*, 6 Johns. 331. *Duncan v. Thomas*, Dougl. 196. In this case no judgment had been confessed, under the warrant. BULLER, J., said, the “court had the same jurisdiction, as if the judgment had actually been entered up.” See, also, *Starr v. Schuyler*, 3 Johns. 139, and note.

4. Many questions in regard to the *time* of the payment of usury,

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under the English statute, have arisen, which have a more or less direct bearing upon this question of the effect of a judgment upon the original contract,—but none of them, perhaps, directly affecting the question raised in this case. They will be referred to in the subsequent case of *Grow v. Albee*, in Orleans county, reported in this volume. The case of *Fanning v. Dunham*, 5 Johns. Ch. R. 122, which is relied upon by the plaintiff's counsel as most in point, as justifying this court in allowing the orator to recover the usury paid in pursuance of the several judgments, shows very fully the history of the decisions at common law upon this subject, and is here referred to for that purpose. But the case is not in point, to justify relief in the present case;—for 1st, The bill, in that case, was brought expressly for *setting aside the judgment*;—and 2d, The judgments were mere confessions, under warrants of attorney, such as we have seen are always relieved against at common law, even.

5. But the very full examination, which we have given this case, has induced us to recommend to the chancellor of this circuit to modify his decree in some respects, for the purpose of reaching the more perfect equity of this case, as it seems to us.

1. We think it more in accordance with the usual equity practice, that the case should be *finished* in the court of chancery;—although there are many exceptions to this practice.

2. As the bill is not demurred to, or objected to, as we understand, in the court below, on the ground of *multifariousness*, we think it best that the orator should have relief in regard to whatever usury was paid upon the note for the oxen;—which, in the greatest strictness, might be liable to the objection of involving distinct matters in the same bill, but which may well be included in this decree, when modified as above recommended.

3. As the orator has really prevailed upon all the points litigated, but for the judgments at law, which is a mere technical bar and really shuts out the true equity of the case, we recommend the chancellor to allow the orator his costs in the court of chancery. In this court he will be entitled to them, as matter of right.

The decree of the chancellor is reversed, and the case remanded, to be proceeded with according to the foregoing recommendation,—that is, that, upon computing all sums of usury, upon all the demands

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named in the orator's bill, which sums were not *ultimately paid upon judgments*, and the costs in the suit in chancery, on the part of the orator, in that court and in this, the amount be set against the sum of the defendant's claim in the suit at law, including his costs in the court of law to the time of the decree; and, if the balance is in favor of the defendant, he be decreed, upon the payment of the same, to surrender the note, or notes, in suit, to be cancelled, and, if in favor of the orator, he have a decree for the same, and execution after sixty days.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA.

APRIL TERM, 1847.

PRESIDENT,

Hon. ISAAC F. REDFIELD,
Hon. MILO L. BENNETT,
Hon. DANIEL KELLOGG,
Hon. CHARLES DAVIS, } ASSISTANT JUDGES.

JAMES MULLEN v. JAMES GILKINSON, 2d.

{ It is well settled by repeated adjudications in this state, that if a party, under a contract to labor for a specified period, leave the service of the party with whom he contracted, before the expiration of the time and without sufficient cause, he cannot sustain an action thereon.

It is no sufficient cause for abandoning such contract, that the party was employed, with his own consent, upon work not contemplated at the time the contract was made.

Nor that the person making such contract had difficulty with another person in the service of his employer, and his employer refused, upon his solicitation, to discharge such other person.

BOOK ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows.

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The plaintiff's account was for about three months' labor, which was performed for the defendant under a contract that he would labor for him seven months, at eleven dollars a month. It appeared that the defendant, not having sufficient work upon his farm to keep the plaintiff busy, employed him, with his consent, in ditching for other people and received the pay therefor himself. It also appeared, that the plaintiff had some difficulty with another person, also in the service of the defendant, and solicited the defendant to discharge such person, and that, upon the defendant's declining to do so, the plaintiff abandoned the service of the defendant and commenced this action to recover for the labor which he had performed under the contract.

The county court rendered judgment upon the report in favor of the defendant. Exceptions by plaintiff.

J. D. Stoddard for plaintiff.

— — — — — for defendant.

The opinion of the court was delivered by

KELLOGG, J. This was a suit to recover for the personal services of the plaintiff. Upon the facts detailed in the auditor's report, the county court rendered judgment for the defendant; and the question here raised for consideration is, whether that judgment was erroneous. As the services of the plaintiff were rendered under a contract for a fixed period of labor, and as the plaintiff left the service of the defendant without his consent and before the fulfilment of the contract, his right to recover for the services actually rendered must depend upon the fact, whether the plaintiff had sufficient cause for leaving the employment of the defendant. For it is well settled by repeated adjudications in this state, that if a party, under a contract to labor for a specified period, leave the service of the party with whom he contracted, before the expiration of the time and without sufficient cause, he cannot sustain an action thereon. *Hair v. Bell*, 6 Vt. 35.

The question then arises, had the plaintiff sufficient cause to justify his leaving the service of the defendant? The case finds, that the defendant employed the plaintiff a portion of the time in ditch-

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ing upon lands other than the defendant's; but this would furnish no sufficient cause for abandoning the contract, inasmuch as the employment was with the *consent* of the plaintiff. *Hair v. Bell, ub. supra.* Indeed, the case does not disclose a single fact, that furnishes the slightest justification to the plaintiff for leaving the service of the defendant. The services rendered by the plaintiff were under a contract to labor for the defendant seven months. It was an entire contract, and the performance of it was a condition precedent to the plaintiff's right of recovery.

The judgment of the county court was correct and is affirmed.

ALFRED MORRILL v. JOHN G. ADEN.

Infancy is a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse, whether such action is in form *ex delicto*, or *ex contractu*.

But the infant must either affirm or avoid the entire contract; and if he choose to affirm it, after he becomes of age, by bringing an action upon the notes given upon consideration of the sale, he cannot, upon his plea of infancy, preclude the defendant from taking advantage of the false warranty, in any proper manner, as a defence.

It is well settled, that a contract may be avoided for an entire want of consideration, or failure of consideration. But where the plaintiff sold a clock and a horse for a harness and two promissory notes, and falsely and fraudulently warranted the horse to be safe and kind, and it appeared that the horse had such an inveterate habit of kicking as to render him worthless, it was held, that there was not such an entire failure or want of consideration as to constitute a defence to the notes, notwithstanding the clock had not been in fact delivered by the plaintiff.

But it was held, that the failure of consideration, in such case, was such as to authorize the defendant to rescind the entire contract; and it appearing that he had offered to do so in reasonable time, and that the plaintiff had refused to receive the horse and surrender the notes and harness, it was held, that this constituted a sufficient defence to an action upon the notes.

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ASSUMPSIT upon two promissory notes, dated June 5, 1845. The defendant pleaded the general issue, and also pleaded, in offset, that, on the 5th day of June, 1845, in consideration that the defendant would purchase of the plaintiff a certain mare, the plaintiff warranted the said mare to be kind and safe in the harness and suitable for the use of the defendant's family; and he averred a breach of the warranty. Trial by jury, June Term, 1846,—KELLOGG, J., presiding.

On trial, the plaintiff having given in evidence the notes declared upon, the defendant proved, that on the 5th day of June, 1845, the plaintiff sold to the defendant a horse and a clock, for which the defendant was to deliver to the plaintiff a harness and the two notes declared upon; and that the defendant delivered the harness and the notes to the plaintiff, and the plaintiff delivered the mare to the defendant; but there was no proof, that the clock had ever been delivered. The defendant also proved, that the plaintiff then warranted the mare to be kind and safe for any person to use; but that, in fact, the mare had such an inveterate habit of kicking, that she could not be harnessed without being fettered, that she was an unsafe and dangerous beast to use, that by reason of her habit of kicking she was nearly or quite worthless, that all this was well known to the plaintiff before the sale, and that the defendant, upon the same 5th of June, 1845, upon discovering the vicious habits of the mare, requested the plaintiff to receive her back and surrender the harness and notes,—which the plaintiff declined doing. The plaintiff then proved, that at the time of the sale and warranty he was under twenty one years of age.

Upon these facts a verdict was taken for the plaintiff, by consent, for the amount of the notes, under a rule, that the court should enter a judgment for the plaintiff, or defendant, as the case might be, with liberty to the parties to except.

The court rendered judgment for the defendant. Exceptions by plaintiff.

A. Underwood for plaintiff.

1. There is a variance between the allegations in the plea in offset and the proof,—the sale of the clock not being alleged as a portion of the consideration for the harness and notes delivered by the de-

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fendant. 1 Chit. Pl. 263, 271. *Curley v. Dean*, 4 Conn. 265. 3 Stark. Ev. 1548-1562. *Swallow v. Beaumont*, 2 B. & A. 765. *White v. Wilson*, 2 B. & P. 116. *Vail v. Strong*, 10 Vt. 457. 1 Greenl. Ev. 79.

2. The minority of the plaintiff is a complete defence to the plea in offset. There was not a total failure of the consideration of the notes; and nothing short of this would defeat them. Issue is joined upon the plea in offset, and a breach of warranty is the *gist* of the matter. To this the plaintiff's minority is a complete answer; and he is therefore entitled to judgment on the verdict. *Jennings v. Rundall*, 8 T. R. 335. 1 Keb. 778. 1 Lev. 169. *Green v. Greenbank*, 4 E. C. L. 375. 2 Kent 241. Chit. on Cont. 123. 2 Stark. Ev. 724. *West v. Moore*, 14 Vt. 448.

T. Howard for defendant.

The case of *West v. Moore*, 14 Vt. 447, is not applicable to this case. That was an attempt, by an action of tort, to hold an infant liable for a false warranty that a horse was of a certain age; whereas in the case at bar the infant asks the court to allow him to use his privilege for the purpose of *enforcing* a contract founded in fraud, and without consideration.

It is well settled, that, if the consideration of a contract fail, or if there were no consideration, this will constitute a full defence under the general issue. 2 Vt. 439. 4 Vt. 174. 10 Mass. 254. 15 Johns. 230. 19 Johns. 53. 1 Stark. Ev. 280. The cases of *Farr v. Sumner*, 12 Vt. 28, and *Bigelow v. Kinney*, 3 Vt. 353, fully authorize a recovery by the defendant under the plea in offset.

The doctrine, that an infant may rescind his contract and yet retain the consideration, is wholly destitute of principle, and is not sustained by the authorities. In such case the parties are in the same situation, as if the contract had never existed.

The opinion of the court was delivered by

DAVIS, J. This is assumpsit on two notes payable in specific articles. The general issue was pleaded, and also a plea in offset, and issue was joined to the country.

It appears by the exceptions, that the consideration of the notes was the sale to the defendant of a mare and a clock. In addition

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to these notes the defendant delivered to the plaintiff, at the time he received the mare, a harness. The clock was never delivered. The plea in offset is founded upon a warranty, that the mare was kind and good to work, whereas, in truth, she had an inveterate habit of kicking, so that she could not be harnessed without being fettered, and was unsafe and dangerous to use, and worth little or nothing. The case shows, that the plaintiff knew of these vicious qualities of the animal when he sold her to the defendant. The reply which the plaintiff makes is, that he was under twenty-one years of age, when he made the warranty.

On the principles of the case of *West v. Moore*, 14 Vt. 447, it is obvious, that the offset cannot be sustained. In that case the action was brought in form *ex delicto*, and yet, being founded upon a contract, the court held that it was governed by the same principles, as if it had been assumpsit. Here it is assumpsit; had it been otherwise, this matter could not have been pleaded as an offset.

In analogy to the case of *Bigelow v. Kinney*, 3 Vt. 353, I think the whole contract must stand or fall together. It was competent for the plaintiff, when he came of age, to have disaffirmed the whole bargain, returning the harness and the two notes to the defendant and demanding the mare. Instead of doing so, he has, by bringing this suit, chosen to affirm it, in all respects, except that he wishes to extricate himself from that portion of it, which binds him to the observance of good faith and common honesty in the fulfilment of it. To permit him to do this would, instead of affording a salutary and necessary protection to infants from their contracts generally, enable them to use this privilege for the perpetration of frauds upon others. This would be manifest injustice. On this ground I am of opinion, that, by thus affirming the contract on his part, he is estopped from setting up infancy as a defence to that portion of the contract obligatory upon him. To adopt the language of PRENTISS, J., in the case above cited, "Nothing is clearer, than that a party cannot affirm an entire contract in part and avoid it in part." However, the court have chiefly regarded the present case under another aspect,—that is, under the plea of the general issue.

It is well settled, that, upon an entire want of consideration, or failure of consideration, the contract may be avoided. If the consideration for the notes had not included a clock, as well as the mare,

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which clock, though not delivered, for aught that appears the plaintiff was able and willing to deliver in accordance with the contract, we should have no hesitation, from the facts stated, in coming to the conclusion, that the mare might be regarded as affording no legal support to the promise on the part of the defendant. In such case he could not only resist the payment of the notes, but could maintain trover for the harness actually delivered. This last point was so decided on the present circuit, in a case in Windsor county.* The main facts were substantially the same as here, except that no question of infancy arose. A recovery was resisted solely, or chiefly, on the ground that the contract of sale was made on Sunday, and that, both parties being equally in fault, *potior est conditio defendantis*. This defence was not, however, allowed to prevail.

The sale of the horse and clock on one side for the harness and notes on the other constituted an entire contract; and a failure of value as to one of the articles would not necessarily render the whole contract without consideration, and for that reason avoidable. It is possible, that an inquiry as to the value of the clock might be gone into before the jury, and the damages be reduced *pro tanto*. The authorities on this point are conflicting, and we give no opinion respecting it.

We think, however, that the failure of consideration here was to such an extent, as to authorize the defendant to rescind the contract altogether. This he offered to do, in a reasonable time. Even if he had the right to *recoupe* the damages, or have them cut down to the value of the clock, still the purchase of the horse may have constituted the main inducement to the bargain, without which it would not have been entered into; and on that ground he ought to be allowed, at his own option, to treat it entirely as invalid. This is a doctrine in accordance with equity and justice, and sanctioned at law, as well as in equity, by the best authorities. Chancellor KENT says, [2 Kent 470,] "If a title to a part of the chattels sold had totally failed, so as to defeat the object of the purchase, as if A. should sell B. a pair of horses for carriage use, and the title to one of them should fail, it is evident, from analogous cases, that the whole purchase might be held void, even in a court of law." A

* Adams v. Gay, *ante*, page 358.

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similar principle was adopted by Lord KENYON, in respect to the purchase of three lots of real property at auction, the title to two of which failed. *Chambers v. Griffiths*, 1 Esp. R. 150. See, also, 11 Johns. 525. As applied in chancery, Lord BROUGHAM, it is true, was only inclined to admit the rule, with the qualification, that there was some connection between the different lots, so that a presumption shoud be afforded, that the purchaser would not have made the purchase, had he been aware of the true state of facts. 8 Cond. Ch. R. 516.

On the whole, the judgment of the county court is affirmed.

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SETH BURROUGHS v. WALTER WRIGHT, MOSES KITTREDGE AND JAMES RAMSAY.

[Same Case, 16 Vt. 619.]

Where property has been attached by one officer, and is in his custody, a return by another officer, who also holds a writ of attachment against the owner of the property, that he has attached the same property, subject to the first attachment,—still leaving the property in the possession of the first attaching officer,—will create no lien upon the property; and it makes no difference, that the officer making the first attachment was one of the plaintiffs in the second writ, and so could not serve it,—nor that it was at the time agreed between the two officers, that the writ held by the second officer should stand in any particular order of priority.

An attachment cannot exist without custody, or possession, either by the officer, or by his servant.

Where an officer attaches personal property upon three writs of attachment, and at the same time levies an execution upon the same property, subject to the attachment upon the three writs, and takes the property into his possession, and the executions obtained upon the three writs first served are placed in the hands of another officer, leaving the fourth execution in the hands of the first officer, this gives such other officer no right to take the property from the possession of the first officer.

And it makes no difference, in such case, that the second officer, upon receiving the executions, demanded the property of the first officer, and he consented that it might be taken, if such consent were in fact revoked, before it was acted upon by the second officer.

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And if, after such consent is revoked, the second officer take the property into his possession, he has no right to retain it, as against the first officer; and the first officer will not become a trespasser by retaking the property, to be disposed of upon the execution still retained by him;—nor will he become a trespasser, as to the second officer, by any subsequent irregularity in his proceedings upon that execution.

If an execution debtor consent that his property may be sold upon the execution without advertisement, the sale is valid, and is so far an official sale, that the officer's return upon the execution is *prima facie* evidence in favor of the officer and of those who acted under him.

TRESPASS for taking certain personal property, described in the plaintiff's declaration. Plea, the general issue, with notice of special matter of defence, and trial by jury, December Term, 1844,—
REDFIELD, J., presiding.

On trial the following facts appeared. The defendant Wright, who was a deputy sheriff, held four writs of attachment against the defendant Ramsay, in favor of Jacob C. Bean, John Bacon, John Kelly & Co. and the Farmer's & Mechanics' Co.,—the three first of which were placed in his hands for service, and the fourth he held but could not serve, for the reason that he was one of the company who were plaintiffs. Wright went to Ramsay's on the 10th of April, 1843, taking one French with him, for the purpose of making an attachment, and sent for the plaintiff, who was constable, to come and serve the writ in favor of the Farmers' & Mechanics' Co., and said to French, that he should wait, until Burroughs came to serve that writ, before he proceeded to make any attachment. The plaintiff came and took the writ in favor of the Farmers' & Mechanics' Co., and it was agreed that he should wait and attach a horse and sleigh, with which Ramsay, who was then absent, was expected soon to return. Wright then proceeded to attach the property, and was making his return, when the defendant Kittredge came and put into Wright's hands, for service, an execution in his favor against Ramsay for \$919.05. Ramsay returned without the horse and sleigh, and it was then arranged between Wright and the plaintiff, that the plaintiff should return, as attached upon the writ in favor of the Farmers' and Mechanics' Co., the same property which Wright returned upon the other writs and the execution in favor of Kittredge, and that the writ in favor of Bean should be the first in order of pri-

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ority, the writ in favor of the Farmers' & Mechanics' Co.. the second, the other two writs next, and then the execution in favor of Kittredge. A part of the property attached was left in the possession of French, and the remainder in that of Kittredge.

Judgments were duly obtained, on the 21st of April, 1843, in the actions upon which these writs issued, and the executions were placed in the hands of the plaintiff for collection, and he demanded the property of Wright on the 22d of April, 1843. Wright consented that he might take the property, and the plaintiff went and examined it, but did not take it into his possession. The plaintiff then advertised the property to be sold the 6th day of May, 1843, at one o'clock in the afternoon, upon the four executions in his hands. On the same day Wright advertised the same property to be sold upon Kittredge's execution, on the same 6th of May, at ten o'clock in the forenoon, and the plaintiff, having learned this, and that Wright intended to hold on upon the property by virtue of Kittredge's execution, on the same day, by direction of the creditors, or some of them, took down his advertisement and advertised the property to be sold May 6, 1843, at nine o'clock in the forenoon. After this, and on the same day, the plaintiff took the property into his possession.

On the fifth day of May, 1843, Ramsay wrote upon Kittredge's execution a request to Wright to sell the property on that execution, and thereby agreed to take no advantage of him for not advertising it according to law; and on the same day the defendants took the property, and Wright sold it upon Kittredge's execution. The judgments in favor of Jacob C. Bean, John Bacon and John Kelly & Co. against Ramsay amounted in the whole to \$47,50; and Wright returned, upon Kittredge's execution, that he tendered that amount, and all legal fees upon the three executions, to the plaintiff, and that he still held the same, the plaintiff having refused to receive it, and that he had paid the balance of the avails of the property, being \$103,23, to Kittredge.

The plaintiff objected, that Wright's return upon Kittredge's execution was not competent evidence to prove the facts therein stated; but the court overruled the objection.

The court intimated, that they should charge the jury, that, if the first attachment was made by Wright, and he was to be considered as having the custody of the property until the time of the demand

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made by the plaintiff,—which seemed to be implied from the returns on all the processes, and from the demand itself,—his assenting, at that time, that the plaintiff should take possession would not change the rights of the parties, until the plaintiff had actually taken possession under such permission ; that, if the plaintiff, before that was done, became aware of Wright's intention not to surrender the possession, and to sell upon Kittredge's execution, and he then went and took possession of the property, he would be in no better condition, than if Wright had never given any such consent ; that, considering the case aside from any surrender of possession by Wright, if he made the first attachment, and retained the possession of the property, the return of the attachment by the plaintiff upon the writ in favor of the Farmers' & Mechanics' Co. could not create any lien in their favor, as against Wright, or the creditors in the precepts in Wright's hands ; that until all those precepts were withdrawn, or satisfied, Wright was not obliged to surrender his possession, and the plaintiff was not justified in taking the property out of his possession, until Kittredge's execution was satisfied ; and that, after it was so taken, Wright might lawfully retake the property and sell it upon Kittredge's execution, in the manner returned thereon, and apply thereon the entire avails of the sale, unless the creditors in the other executions, besides the one in favor of the Farmers' & Mechanics' Co., perfected their lien by putting their executions into Wright's hands.

The plaintiff submitted to a verdict for the defendant, with leave to except.

T. Bartlett for plaintiff.

The proposition, that the Farmers' & Mechanics' Co., to create or preserve a lien upon the property, should have put their writ into Wright's hands is effectually answered by the fact, which now appears in the case, that Wright was one of the plaintiffs in that suit.

The plaintiff contends, that in point of fact the attachments were simultaneous. It does not appear, that Wright claimed to have the control and possession, as against the plaintiff, until after he levied his executions and removed the property. At the time of the attachment Wright did not claim the possession adversely to the plaintiff,

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but consented that the plaintiff might attach the property, and postponed two of his writs, to prefer the attachment of the plaintiff. If, then, the attachments were simultaneous, the plaintiff insists, that he had the same right to the possession that Wright had, and that Wright's possession was his possession. *Sigourney v. Eaton*, 14 Pick. 414. 19 Pick. 544.

The plaintiff insists, that the defendant had no right to take the property from his possession and sell it at private sale for the benefit of one creditor, to the exclusion of the first attaching creditor. Wright was bound to keep the property thirty days, that it might be charged in execution. Instead of doing this, he disposed of the whole property within fourteen days after the judgments were recovered; and doing this, after the plaintiff had, with his consent, taken possession of the property, was a conversion.

The county court erred in admitting the return of Wright on Kittredge's execution as evidence of the facts therein stated. The sale, being by agreement of parties, was not an official act.

for defendants.

That property in the hands of a sheriff may legally be sold, by the agreement of the debtor and creditor, has long been the settled law of the state. *Munger v. Fletcher*, 2 Vt. 524. If the return upon the execution is not admissible evidence in a court of justice, it is nugatory for all purposes;—but such, we apprehend, is not the law. If the sale was sufficient to transfer the property to the purchaser, of which there can be no doubt, the sale may be shown by *parol*, if the officer has made an insufficient return, or no return,—and if by *parol*, then certainly the return of the officer, under his official signature, should not be excluded. *Gates v. Gaines*, 10 Vt. 346.

It has been urged in this case, that one officer can attach property in the possession of another. Such practice we consider as tending to much confusion. Let the property be where it will, there is no constructive possession in any one but the attaching officer, while the lien created by the attachment is continued. *Watson v. Todd*, 5 Mass. 271. *Vinton v. Bradford*, 13 Mass. 114. *Tompson v. Marsh*, 14 Mass. 269. *Adams v. Abbot*, 2 Vt. 383. *Sawyer v. Middletown*, 10 Vt. 238. *Blake v. Shaw*, 7 Mass. 505.

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The bill of exceptions shows, that Wright consented that the plaintiff might take the property. This implies no obligation upon Wright, until the plaintiff acted in pursuance of it; and Wright might withdraw the consent at any time before the sale of the property by the plaintiff. Wright could make no agreement with the plaintiff, which would contravene his duty as a public officer, which would be binding upon him. It was his duty to sell the property upon Kittredge's execution; and if he had suffered it to go into the plaintiff's possession, either by misapprehension of the law, or by fraudulent connivance, it was equally his duty to repossess himself of it.

The opinion of the court was delivered by

REDFIELD, J. Many of the questions involved in this case were decided by this court on the former hearing. 16 Vt. 619.

1. That no lien was created in favor of the Farmers' & Mechanics' Co. by the plaintiff's service of their writ, as stated in that case. We do not think the difference in this case is important. It is true, that Wright could not have served that writ; but the plaintiff might have served them all; and if it was the desire of all concerned to have that writ served prior to Kittredge's execution, they could have put the processes into the plaintiff's hands. But the fact, that Wright could not serve this writ, is no reason why the court should attempt to create a lien, *without attachment*. The same reason will apply in all cases, where the officer is the *sole party*. But it will hardly be expected, in such cases, that a different rule is to apply. Nor is the case different, as to the facts, in any other material point.

2. It is of no consequence, so far as relates to the principle, whether Wright put *one* writ, or *three*, upon the property, before Burroughs was permitted to return his process. The only question is, did he make the *first* attachment, and did he keep the *exclusive possession*? These facts are expressly found by the jury. That, then, will effectually exclude all attachments by the plaintiff;—for an attachment cannot exist, without custody, or possession, either by the officer, or by his servant. Wright's agreement, that Burroughs' writ should stand in any given order of priority, can have no effect, so long as *no attachment* was in fact made.

3. There is no pretence of a simultaneous attachment in this case,

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if, indeed, any such thing can ever exist,—which I should somewhat question.

If, then, the plaintiff acquired no right to the possession of the property by the service of his writ in favor of the Farmers' & Mechanics' Co. against Ramsay, did he acquire any such right, when the executions upon the former attachments came into his hands? We think not.

It is not necessary to hold that the creditors in those executions lost their lien. Very likely they did not. It seems Wright so regarded it at the time; for he retained in his hands the amount of those executions,—which I do not see but Burroughs is still entitled to, if he properly charged the property in execution, as perhaps he did, by his demand of Wright. But clearly this gave the plaintiff no right to take the property out of Wright's hands, and thus defeat the lien upon Kittredge's execution. That lien could not be transferred to another officer, and, if the property were surrendered, would be gone, and Wright would thus become liable for the value of Kittredge's legal claim. The plaintiff, then, was clearly a trespasser in taking the property, unless Wright's consent, which was revoked *before it was acted upon*, created a right to possession in the plaintiff.

This consent was revocable, we think,—1. Because it was given without consideration, and the plaintiff made aware that it would be revoked before it was acted upon, and so the plaintiff was not misled or in any way injured by it. In short, being given without consideration, it would be revocable until acted upon; and if so revoked, as it was in this case, it would be, to all intents, the same as if it had never been given. 2. It was given by Wright under a *mistake* as to his own rights, and so clearly revocable, unless so acted upon as to place Burroughs in such a situation, that he would be injured, if the permission were revoked,—which was not the fact in this case.

Burroughs, then, at the time he took the property, having no right to the possession, but that being in Wright, *he* might well *re-take* it; and his subsequent proceedings, if they had been irregular, would not have made him liable in trespass to the plaintiff, as long as he was not a trespasser in taking the property from the plaintiff, and the plaintiff was not the general owner and had no right to the

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possession. If liable to any one, it would be to the debtor; but *he* having expressly waived all claim, and having consented to a sale without the requisite time of advertisement, the sale is binding upon him. The other creditors, if their lien was still kept good, have no reason to complain, so long as they might and may still, perhaps, have their money; and if they have lost this right, it is clearly by their own voluntary conduct, and not in consequence of any irregularity in this sale, or by being in any manner misled by that. We think the sale is therefore valid, and so far an official sale, that the return was *prima facie* evidence in favor of the officer and those who acted under him. It is not necessary to decide how far such a sale is to be treated as a sheriff's sale, *to all intents*. Perhaps, for some purposes, a sheriff's sale should be strictly *in invitum* in its full extent.

But, as the Farmers' and Mechanics' Co. had no lien, and the other liens have been satisfied,—or offered to be, which is the same thing,—and all the *other parties interested* have consented to the sale, we do not see what ground of objection there is left. This point was in effect decided in the former case reported.

Judgment affirmed.



ISRAEL CUTTING v. SAMUEL R. COX.

In the ordinary case of carrying on a farm at the halves, the owner of the farm is not so far divested of the possession, that he may not maintain trespass, in his own name, for any injury to the inheritance. As to the growing crops, in which the parties have a joint interest, they should join in the action. But where the tenant, in such case, disclaimed all occupancy of a portion of the land, in reference to which a controversy existed between the owner of the land and a third person, and refused to take possession of it, it was held, that the owner of the land might sue, in his own name, for an injury to the crops upon such portion.

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A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards; and in such action he may recover all damages intervening between the time of disseizin and re-entry, together with damages for a subsequent entry by the defendant.

The entry upon the land, by the owner, and measuring the lines, and asserting upon the land his claim of title, and directing his agent to cut the grass thereon, with notice of all this to the disseisor, constitutes a sufficient re-entry by the owner, to enable him to recover damages, in an action of trespass, for the value of the grass which the disseisor subsequently cut upon the land.

TRESPASS quare clasum fregit. Plea, the general issue, and trial by the court, June Term, 1846,—KELLOGG, J., presiding.

Upon trial the facts appeared as follows. The trespass was alleged to have been committed upon a lot of land in Walden. In April, 1845, the plaintiff received a lease of a portion of the lot from the selectmen of the town, extending from the south line of the lot fifty rods on the west line and sixty rods on the east line. The defendant received from the selectmen a lease of the remainder of the lot. One Goochy had a right to occupy the plaintiff's portion of the lot, under a written contract, by the terms of which he was to have one half of the produce, and certain compensation for each acre of wild land, which he might clear; and Goochy's half of the crops was to remain in the plaintiff's hands, as security for any advances which the plaintiff might make to him.

After the parties had taken their leases, a question arose as to the division of the lot; and the defendant and Goochy measured the lines, and made what they supposed to be the true division. Soon after, that is, in April, or May, the defendant and Goochy made a division fence, agreeably to their measurement. The defendant occupied to the fence, claiming to have title to the land, until about the first of September after; when Cutting, by accurate measurement, ascertained that the fence was about a rod and a half on his land. The defendant was present at that time, but, after the measure was made, refused to acquiesce and remained in possession, as before. Cutting then told Goochy to cut the grass between the fence and the line measured by him,—which, for the purpose of this trial was conceded to be the true line,—and Goochy informed the defendant of this. The defendant then cut the grass, to the fence.

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Previous to the execution of these leases both parties had been in possession of this lot,—but under a different division from the one made by the leases,—and had some difficulty respecting their lines; and Goochy, when this difficulty arose, said he would have nothing to do with the land in dispute;—but it appeared that Goochy acted as the agent of the plaintiff, in keeping possession of the land in dispute. It did not appear, that Goochy had authority to measure the lines with the defendant in any manner.

The county court rendered judgment for the plaintiff, to recover the value of the grass cut by the defendant between the fence and the line measured by the plaintiff. Exceptions by defendant.

B. N. Davis for defendant.

Trespass *quare clausum fregit* can only be maintained by him, who has actual possession of the premises at the time the act complained of was committed. 1 Chit. Pl. 176. *Ripley v. Yale*, 16 Vt. 257. 9 Johns. 61. 1 Ib. 5. 12 Ib. 183. 8 Mass. 411. *Wheeler v. Hotchkiss*, 10 Conn. 225. 9 Ib. 216. *Catlin v. Hayden*, 1 Vt. 375. The contract between Goochy and the plaintiff shows, that Goochy was the tenant of the plaintiff, with the exclusive right of possession, rendering to the plaintiff by way of rent, one half of the produce of the land. The most the plaintiff could claim would be as tenant in common of the crops, with the possession of the land in his tenant until the crops were divided.

2. The defendant having been put in possession of the land in question by Goochy, whether he were agent or tenant of the plaintiff, his possession was exclusive, and therefore neither Cutting, nor Goochy, as tenant, nor both, as tenants in common, could maintain trespass *quare clausum fregit*, until he was dispossessed. 8 Mass. 411. 1 Chit. Pl. 177. *Ripley v. Yale*, 16 Vt. 257. *Bakersfield Cong'l Soc. v. Baker et al.*, 15 Vt. 119.

S. B. Colby for plaintiff.

1. The plaintiff, having entered and taken possession of the land described in his lease, is deemed to be in possession of the same to the extent of his written claim of title. *Spear v. Ralph*, 14 Vt. 400. The defendant should derive no benefit, by reason of having enclosed a part of the plaintiff's land with only the assent of Goochy,

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who had no authority. *Crowell v. Bebee*, 10 Vt. 33. *Stuyvesant v. Tompkins*, 9 Johns. 61; 11 Ib. 569.

2. The case finds, that the *true line* was run in September, the plaintiff and defendant being present together on the disputed land; and the plaintiff then asserted his right, and instructed his agent to cut the grass on the piece fenced off,—of which the defendant had notice. This was sufficient entry and notice to entitle the owner to his action of trespass, and is fully within the principle of *Butcher v. Butcher*, 14 E. C. L. 59. 3 Bl. Com. 175. Co. Lit. 15. *Beecher v. Parmele*, 9 Vt. 352.

3. The tenancy of Goochy cannot deprive the plaintiff of his action. 1. The piece in controversy was excepted from the operation of the lease. 2. Goochy was the plaintiff's agent in keeping possession of the land. These facts are found by the county court.

The opinion of the court was delivered by

REDFIELD, J: As between the plaintiff and Goochy, the question, which should bring the action, may be in some sense determined by inquiring who was injured by the trespass complained of. If this were the ordinary case of carrying on a farm at the halves, it has not been considered that the owner of the land is so far divested of the possession, that he may not maintain trespass, *in his own name*, for any injury to the *inheritance*,—as digging stone, or cutting timber. As to the growing crops, in which the parties have a joint interest, the parties are treated as tenants in common, or, more properly, joint tenants, perhaps, and they should join in the action. If they do not join, the non-joinder can only be pleaded in abatement. If not so pleaded, it will only affect the question of damages. These principles being merely elementary, it is hardly necessary to quote authorities.

This might be the present case, if the land in dispute formed a portion of the premises in the occupancy of Goochy at the time of the alleged trespass. But that does not seem to be the fact. Goochy disclaimed all possession in his own right, and said he would have nothing to do with this land. It is conceded, that the land belonged to the plaintiff. It seems clear, if Goochy was not in possession and would not consent to take possession, in his own right, that no action could be maintained in *his* name. If not, then the

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plaintiff must be permitted to sue in his own name, or he cannot sue at all.

The only remaining question is, whether the plaintiff has elected the proper form of action. It appeared in the case, that the defendant took possession of the land under a mistaken division, made between him and Goochy, which Goochy had no right to make on the part of the plaintiff. But the defendant had taken actual possession in such a manner as to create a disseisin, at the election of the plaintiff; and, after the true line was ascertained, the defendant persisted in maintaining his possession,—which would clearly justify the plaintiff in treating it as a disseisin and bringing ejectment.

But in all cases of disseisin the plaintiff may also maintain trespass, if the entry were made while he was himself in possession; but in such case the damages will be restricted to the first entry, unless the plaintiff make a re-entry upon the land before action brought. In such case he will recover all his intervening damages, the same as if he had brought ejectment and recovered the seisin. If the plaintiff can re-enter upon the land, it is the same, as to recovering intervening damages, as if, at common law, he had first re-seised himself by a recovery in ejectment. And if the defendant still maintains his possession, it makes no difference; he is still considered a trespasser upon the lawful owner of the land, so long as he shall continue to re-invest himself with the possession of the land by re-entry. After the re-entry the law considers the freehold and possession to have all along continued *in him*; and the disseisin is cured by the re-entry, until some fresh act of disseisin,—which is itself a trespass, in the first instance, as every disseisin includes a trespass; and if continued, there must again be a re-entry.

This is fully sustained by the case of *Butcher v. Butcher*, 14 E. C. L. 59. The wrong doer cannot treat the lawful owner as a trespasser; and if not, then the continuance of the defendant's possession was itself a trespass, as is said in the case of *Butcher v. Butcher*.

In the present case it is very obvious there was a sufficient re-entry by the plaintiff; and from that time the lawful possession would be in him, until the defendant did some act of disseisin,—which seems to have been the cutting of the grass complained of, which was a trespass for which the plaintiff might well recover.

Judgment affirmed.

Sutton v. Cabot.

TOWN OF SUTTON v. TOWN OF CABOT.

Upon an appeal from an order of removal of a pauper, the question, whether the pauper had come to *reside* in the town procuring the order, within the meaning of the statute, may be presented by plea, as well as by motion to quash the proceedings.

There is nothing in the third section of chapter sixteen of the Revised Statutes, in relation to the removal of paupers, which authorizes the removal of a transient pauper.

In this case the pauper was an old lady, who had resided for several years with her son in Cabot. In December, 1844, she went to Sutton to visit her daughter, taking nothing with her but a change of raiment, and intending soon to return. In February, 1845, about the time she intended to return, she had a slight attack of sickness, which prevented her returning at that time. In April, 1845, the day before she was again expecting to return to Cabot, she had a more severe attack of sickness, which rendered it impossible for her to return; and in this state she remained until June 9, 1845, when application was made to the town of Sutton for aid in her support; and they maintained her from that time until her decease, which was in September, 1846. On the 22nd of October, 1845, the town of Sutton procured an order of removal; and previous to that time there had been no change in the determination of the pauper to return to Cabot, except what resulted from the impracticability of such return. In September, 1845, her son, with whom she had resided in Cabot, lost his wife by death, and in November, 1845, he ceased to keep house and removed to Walden, where he boarded with his daughter;—and from this time there was no evidence that the pauper expected she should ever be able to leave Sutton. And it was held, that the pauper had not come to *reside* in Sutton, within the meaning of the statute, at the time the order was made, and that the defendants were entitled to a verdict.

APPEAL from an order of removal of Mehitable Smith, a pauper, from Sutton to Cabot, made by two justices of the peace, pursuant to the statute. The defendants pleaded, first, that, at or before the time of making the order of removal, the pauper had not come to reside, and did not reside, in Sutton; and secondly, that the last legal settlement of the pauper, at the time the order was made, was not in Cabot. The plaintiffs objected to the first plea, as being a matter which could only be taken advantage of by motion to quash; but the court decided, that the matter might be pleaded in bar; and

Sutton v. Cabot.

the case was tried by jury, December Term, 1846,—REFFIELD, J., presiding.

The jury returned a special verdict. The facts in reference to the settlement of the pauper need not be detailed here, as no decision upon that point was made by the supreme court. The facts in reference to her residence were as follows.

For some years previous to December 24, 1844, the pauper had resided with her son John Smith, Jr., in Cabot, who had supported her without compensation. At that time, being nearly eighty years of age, she felt anxious to visit once more her daughter, who resided in Sutton; and she accordingly went there for that purpose, taking with her nothing, except a necessary change of raiment and a blanket to keep her comfortable on the way, and expecting to return to her son's, in Cabot, in a few weeks, after she had completed her visit; and he expected her so to return. About the time she intended to return, February 8, 1845, she had a slight attack of the palsy, which prevented her returning at that time; but she so far recovered from this in the month of April following, that she expected to have returned to Cabot the next day, when she had a more severe attack, which rendered it impossible for her to return; and she remained in this condition until the ninth of June, when application was made to the town of Sutton for aid in her support; and they maintained her from that time until her decease, which was in September, 1846. The last of June or first of July, 1845, three sheets and three pillow cases were brought to her, for her use, from her son's house in Cabot. The order of removal was made October 22, 1845; and there was no change in the determination of the pauper to return to Cabot, before the order of removal, except what resulted from the impracticability of such return. But at that time there was no reasonable probability that she ever could return; nor was there any evidence that she then expected to return;—but if she had recovered she would undoubtedly have returned to Cabot. The wife of her son John died in Cabot in September, 1845; and in November, 1845, he ceased to keep house, and removed from Cabot to Walden and became a lodger in the family of his daughter. From this time there was no evidence that the pauper had any reason to expect, or that she did expect, she should ever be able to leave Sutton, or that she had any hope of ever going to Cabot, or Walden.

Sutton *v.* Cabot.

From these facts, under the direction of the court, the jury found, that the pauper had not come to reside in the town of Sutton, and was not liable to be removed therefrom; but they found, that her last legal settlement was in Cabot. Exceptions by plaintiffs.

G. C. Cahoon for plaintiff.

T. Bartlett, Jr., and William O. Fuller for defendants.

The opinion of the court was delivered by

DAVIS, J. This was an appeal from an order of removal of one Mehitable Smith from Sutton to Cabot, made October 22, 1845. Two pleas were interposed by the defendants in the county court,—one of which was the usual plea to the merits, that the pauper's last place of legal settlement was not in the town of Cabot. This issue was found against the defendants; and, so far as regards the last place of legal settlement, no question is presented for this court to pass upon.

A farther plea, however, was interposed, to the effect, that the pauper had not come to reside in the town of Sutton, within the true intent and meaning of the fourth section of the Revised Statutes, relating to the support and removal of paupers, and so was not subject to the process of compulsory removal adopted in the case. Issue was taken upon this plea, also, and was found in favor of the defendants. The plaintiffs' counsel objected to this plea, as containing matter which could not be insisted upon by way of plea; but that, if available in any way to defeat the order, it could only be presented by a motion to quash the proceedings for that cause.

It is not easy to understand on what principle such a distinction can be sustained. Granting that it could be presented in the mode proposed,—and I am inclined to think, notwithstanding it puts in issue new matter, not apparent of record, that it might have been so presented,—it by no means follows, that it could not also have been done by plea, as in this case. Should it be farther conceded, that the subject matter is of a nature merely dilatory, not affecting the final merits, it is not perceived how that circumstance excludes the right of presenting it by plea. Matters in abatement, or temporary bar, constitute as proper subjects for a plea, as those of a different character.

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The effect of a verdict against the plaintiffs, however, may be quite different, according to the nature of the questions determined by it. The distinction is of no practical importance in this case, as the pauper has deceased. The verdict determined, that her legal settlement was in Cabot, but, at the same time, that she was only transiently in Sutton, and, though needing relief, was not subject to removal. The plaintiffs were doubtless entitled to reimbursement for their expenditures; but a removal was neither necessary, nor allowable.

The counsel for the plaintiffs have urged, that the present revised code, by the enactment in the third section, making it the duty of the overseers of the poor of the several towns to provide for the comfort and relief of all persons residing in their respective towns, when in distressed circumstances, though having no legal settlement there, *until they can be removed*, has extended the right of removal to transient persons, as well as those who have come to reside, as provided in the fourth section. This is a mistake. The third section of the old code and the fourth section of the new one are substantially alike, and require a similar construction; and nothing in the third section of the new code can have any effect in modifying that construction.

The judgment of the county court is therefore affirmed.

Martin v. Bowker.

HEZEKIAH MARTIN v. BARTLETT BOWKER.

I N C H A N C E R Y.

Where a defendant, in his answer to a bill of foreclosure, insists that he has made payments upon the mortgage notes, and it is referred to a master to ascertain the sum due in equity, and he makes his report, to which no exceptions are taken, no question can be made upon that point in the supreme court, upon appeal.

Courts of equity act in analogy to the statute of limitations; and if, in a suit for the foreclosure of a mortgage, the lapse of time be such, that the orator could not maintain a suit at law for the recovery of the mortgaged premises, a court of equity would presume payment and satisfaction of the mortgage debt. This period is fixed, by our statute, at fifteen years.

But the payment of interest upon the debt, by the defendant, or of any portion of the principal, or any other act recognizing the existence of the mortgage and that it was unsatisfied and obligatory upon him, would be sufficient to repel the presumption of payment and take the case out of the operation of the statute.

A P P E A L from the court of chancery. The bill was brought for the foreclosure of a mortgage, executed December 9, 1820; and the subpoena was dated November 21, 1844. The defendant answered, alleging that he had made various payments upon the mortgage notes each year from 1827 to 1831 inclusive, and also claims the benefit of the presumption arising from lapse of time. The answer was traversed, and testimony was taken; the substance of which is sufficiently detailed in the opinion of the court. It was referred to a master to ascertain the sum due in equity,—which he reported was \$98,58; and no exceptions were taken to the report.

The court of chancery ordered, that the defendant pay the sum reported by the master by a time specified, or be foreclosed of all equity of redemption in the mortgage premises. From this decree the defendant appealed.

E. Paddock for plaintiff.

T. Bartlett, Jr., and Wm. O. Fuller for defendant

Martin v. Bowker.

The opinion of the court was delivered by

KELLOGG, J. This was a bill for the foreclosure of a mortgage. The defendant, in his answer, admits the execution of the mortgage deed and notes, but insists that he made sundry payments upon the notes. The case was referred to a master, who reported the sum due in equity; to which there were no exceptions. The sum thus reported must, therefore, be considered the sum due upon the mortgage securities, and upon which no question can now arise.

But the defendant, in his answer, insists upon the statute of limitations as a bar to this suit; and that is the only question raised for the consideration of this court.

It is well settled, that courts of equity act upon the analogy of the statute of limitations; and if the lapse of time, in the case at bar, be such, that the orator could not maintain his suit at law for the recovery of the mortgaged premises, then a court of equity would not sustain a suit for the foreclosure of the equity of redemption, but would, from such lapse of time, presume payment and satisfaction of the mortgage debt. This period is, by our statute, fixed at fifteen years. In the case at bar more than fifteen years elapsed after breach of the condition of the mortgage and before the commencement of this suit; and consequently the suit would be barred, unless something has intervened to take the case out of the operation of the statute, or to repel the presumption of payment resulting from the lapse of time.

The payment of interest upon the debt, or any portion of the principal, by the defendant, or any other act recognizing the existence of the mortgage, and that the same is unsatisfied and is obligatory upon him, will be sufficient to repel the presumption of payment and take the case out of the operation of the statute.

The testimony in the case shows, that, in March, 1844, the orator and the defendant went into an accounting for the keeping of stock by the defendant for the orator, and for the defendant's personal services; and that the amount found due upon such accounting was, by the consent of the parties, endorsed upon one of the mortgage notes. It was, then, a payment, to that amount, by the defendant, and was such a recognition of the mortgage, as would take it out of the operation of the statute. Again, the testimony shows, that there was talk between the parties of the defendant's taking up the mort-

Morrill v. Kittredge et al.

gage notes and having new notes executed for the balance,—which the defendant declined, saying, "*the orator would feel easier to have the payment endorsed, and so keep the mortgage good.*" This, then, was a recognition of both the notes and mortgage. But the case farther shows, that the defendant, in his answer, admits the making of payments, to be applied upon the notes, as late as 1831, which was less than fifteen years anterior to the commencement of this suit; and that would be sufficient to take the case out of the statute of limitations.

Upon the whole, we are satisfied that the suit is not barred by the statute, and consequently that the decree of the chancellor should be affirmed.

**ABRAHAM MORRILL v. KITTREDGE & MORRILL.****IN CHANCERY.**

In this court appeals from the court of chancery are invariably heard entire.

Objections to mere matters of form, which are regulated by the established rules of the court of chancery, will be considered as waived, if not taken in that court;—and if taken there, and overruled, the decision of that court will be held final.

APPEAL from the court of chancery. The counsel for the orator interposed a motion in this court to order the defendants' exceptions to the master's report to be taken off the file, and the case to proceed to a hearing, as if there had been no such exceptions. This application was founded upon some alleged irregularity in the filing of the exceptions.

THE COURT refused to have the motion argued, as a preliminary question, upon the ground, that, in this court, appeals from chan-

Morrill *v.* Kittredge et al.

cery are invariably heard entire, and said, that little would be gained by giving the original chancery jurisdiction of this court to the several members of the court, if every little matter of form were to be a ground for reversing the decree, and the objections were to be taken up in the order in which they occurred in the progress of the cause; that objections to these mere matters of form, which are regulated by the established rules of the court of chancery, mainly to expedite the business in that court, if not taken in that court, will be considered as waived,—certainly, so far as they are of such a character, that, if pointed out, they might have been obviated in that court; and that, when objections are taken in the court of chancery, and are there overruled, the decision of that court in regard to matters depending upon their rules, or in regard to the time, or form, of taking any particular proceeding, will be held final in this court.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX.
APRIL TERM, 1847.

PRESENT,
Hon. ISAAC F. REDFIELD,
Hon. DANIEL KELLOGG, } ASSISTANT JUDGES.
Hon. CHARLES DAVIS, }

STATE v. GEORGE D. BEAN.

If one of the counts in an indictment is correct, it is sufficient, upon motion in arrest of judgment.

In an indictment for forgery a variance between the count and the forged instrument, in the spelling of a name, is unimportant, if the same sound is preserved.

Where the averments in an indictment for forgery improperly describe the import of the obligation of the contract forged, this defect is not cured by reciting the instrument in *haec verba*;—but a note in these words,—“ For value received I promise to pay Mr. Frank Wilson, or order, the sum of \$25,60 to *bade* the first day of January next and interest,”—sufficiently imports, that it is made payable the first day of January next ensuing its date, and will support an averment to that effect in an indictment for forgery.

INDICTMENT for forgery. In the first count it was alleged, that the respondent forged a certain promissory note, “ purporting to bear ‘ date the twenty-eighth day of April, in the year of our Lord one

State v. Bean.

' thousand eight hundred and forty-six, and to have been signed by
' one David Harriman and one Samuel Gates, for the payment of
' twenty-five dollars and sixty cents the first day of January then
' next after the date of said note, with the interest, to one Francis
' Willson, or his order, the tenor of which said note
' note is as followeth, that is to say,—*April the 28 day year 1846,*
' *For value received I promise to pay Mr Frank Willson or order the*
' *sum of twenty five dollars and sixty cents to Bade the first day of*
' *January next and inest, (signed) David heremon. Samuel Gates;*—
' with intent," &c. The second count was similar, except that it
described the note as made payable "to one Mr. Frank Willson,"
but recited the note, as in the first count. Trial by jury, December
Term, 1846.—Davis, J., presiding.

On trial the forged note was offered in evidence, and was, in all respects, as recited, *in hoc verba*, in the indictment. The respondent objected to its admission, upon the ground of variance; but the objection was overruled by the court.

Other questions were raised; but as they were not insisted upon in the supreme court, they need not be noticed here.

Verdict of guilty. Exceptions by respondent.

— for respondent.

The paper offered in evidence as the forged note does not agree with the description of it contained in the indictment. It does not purport to be payable on the first day of January next after its date, nor to be payable to Francis Willson, nor to be signed by David Harriman. It does not help the indictment, that a literal copy of the note is given in both counts. Arch. Cr. Pl. 45. The instrument must be correctly described, or the respondent will be acquitted. Arch. Cr. Pl. 91, 94-97, 339. *Rex v. Jones*, 1 Doug. 300. *Rex v. Reading*, 1 East 180, n. 2 Leach 590. *Rex v. Gilchrist*, Ib. 657. *Rex v. Edsall*, Ib. 662, n. *Rex v. Hunter*, Ib. 624. 2 East P. C. 928. *Rex v. Barton*, 1 Mood. C. C. 141.

Wm. T. Barron, state's attorney.

A promise to pay is distinctly expressed in the note, without the words "*to Bade*," and the purport of the note is so stated. Those words are meaningless and can have no purport. *Purport* means

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the substance of an instrument, as it appears, on the face of it, to every eye that reads it. 2 Russ. on Crimes 388.

The error in the first count, in averring the note to have been made payable to Francis Willson, is corrected in the second count; and, the verdict being general, the conviction must be sustained. *State v. Davidson*, 12 Vt. 300.

The opinion of the court was delivered by

REDFIELD, J. The only exception now insisted upon is in regard to the variance. As to the person to whom the note is made payable, it is correctly described in the second count; and if one of the counts in an indictment is correct, it is sufficient.

The difference between *Herriman* and *Harriman* is unimportant; it is obviously *idem sonans*, which makes the names the same in law,—for no man is to be acquitted in consequence of bad spelling, merely, in the indictment, if substantially the same sound is preserved. In many names the “e” is sounded like the “a,”—as in most names coming from the continent in Europe. This name is of that character, when spelled with an “e” in the first syllable.

As to the term found in the note, “*to bade*,” whether it is wholly unmeaning, or imports “*to be paid*,” is not important, perhaps. For if wholly stricken out, the note is then payable upon the first day of January;—and if these words have any meaning, they do mean *to be paid*.

It is true undoubtedly, as insisted, that the averments of the obligation, which the note imported, must not be inconsistent with those which seem to flow from it, *as set forth in the bill*; otherwise the judgment will be arrested. And therefore, where the averments in the indictment improperly describe the import of the obligation of any contract forged, this defect is not cured by reciting the instrument *in hac verba*.

Judgment, that respondent take nothing by his exceptions. Sentence, three years in the state prison.

Hopkinson, Adm'x, v. Guildhall.

**DORCAS HOPKINSON, Administratrix of DAVID HOPKINSON, v.
TOWN OF GUILDHALL.**

Where a suit is prosecuted by an administratrix for the benefit of the heirs at law of the estate, the heirs, in case of failure to recover, are liable to contribute for the payment of the costs incurred; and one of the heirs, who has received a portion of the estate in land, is not rendered a competent witness for the plaintiff by executing to her a release of all his interest in any portion of the estate growing out of the claim in controversy,—his liability for costs being thereby in no manner affected.

TRESPASS ON THE CASE for the default of John P. Denison, constable of Guildhall, in not keeping and delivering up on demand certain property attached upon a writ in favor of the intestate against James Steele. Plea, the general issue, and trial by jury, May Term, 1846.—KELLOGG, J., presiding.

On trial, for the purpose of using John H. Hopkinson, one of the heirs at law of the intestate, as a witness on the part of the plaintiff, the said John executed in court a release of the following tenor;—“Essex County, ss. May 26, 1846. For value received of Dorcas ‘Hopkinson, administratrix of the estate of David Hopkinson, late ‘of Guildhall in said county of Essex, I hereby release and discharge ‘to said Dorcas all right, title, interest, claim and demand, which I ‘have, or may have, to any portion of the estate of said David Hopkin- ‘son, growing out of a claim against John P. Denison, as constable ‘of said Guildhall, and which claim is now in controversy between ‘said Dorcas, Adm’x, and said town of Guildhall. Witness my ‘hand and seal,’ &c. It was admitted, that the estate of the deceased had been so far settled, that the real estate had been divided among the heirs,—a portion being distributed to said John,—and that the personal estate was all consumed in the payment of debts. The defendants objected to the sufficiency of the discharge; but the court overruled the objection and admitted the witness to testify.

Verdict for plaintiff. Exceptions by defendants.

Heywood for defendants.

The release was insufficient, for the reason that John H. Hopkinson was interested in the event of the suit, on account of the costs.

Hopkinson, Adm'z, v. Guildhall.

If costs had been recovered against the administratrix, she could pay the same and retain the amount out of the assets, if she had any; and if not, the heirs who have received lands would be bound to contribute for that purpose. Rev. St. c. 49, §§ 45, 46, 48, 49. *Fletcher v. Grover*, 11 N. H. 369. *Ford v. Ford*, 17 Pick. 418.

T. Bartlett and Wm. O. Fuller for plaintiff.

The present question is unlike that raised in *Baxter, Adm'z, v. Buck*, 10 Vt. 548. The estate of Hopkinson had been so far settled, in the present case, that the real estate had been divided among the heirs, of whom John H. Hopkinson was one, and the personal estate had all been consumed in the payment of the debts. The sum recovered will be assets in the hands of the administratrix, and will constitute the whole of the personal estate unconsumed in the payment of debts; and to this the witness has released all his interest. He is not an heir expectant upon the settlement of the estate, but an heir in possession of his share of the estate. The probate court have no authority to decree distribution among the heirs, until after the payment of all liens and charges upon the estate. Rev. St. c. 53, § 3. Then the witness holds his share absolutely, subject to no charge, or lien. If the plaintiff should fail to recover, the defendants' judgment for costs would constitute no lien upon the estate. How could the administratrix ever enforce such a decree against the estate? The probate court has no power to vacate the former decree, annul the title of the heirs, and order a new and different distribution. But supposing the heirs, in consideration of having been admitted to their respective shares in the lands of the ancestor, would in equity be bound to contribute; this would not be true of John H. Hopkinson, who, pending the suit, has released all his interest in the demand. If the heirs, in equity, are bound to contribute, contribution should be made by those, only, who are to be benefited by the plaintiff's recovery.

The opinion of the court was delivered by

KELLOGG, J. The only question, presented in this case for the consideration of the court, is as to the correctness of the decision of the county court, in admitting the testimony of John H. Hopkinson. The witness was an heir at law to the plaintiff's intestate;

APRIL TERM, 1847.



Hopkinson, Adm'x, v. Guildhall.

and, previous to his admission, he executed to the plaintiff a release of all his interest in the suit. It is, however, insisted, that he still remained interested, being liable, in the event of the plaintiff's not succeeding in the suit, to contribute to her towards the costs incurred in the prosecution ;—and we think this exception is well taken. The suit was prosecuted for the benefit of the heirs at law ; and, in case of failure to recover, the heirs would all be liable to contribute to the costs incurred ; and the release of the witness to the plaintiff did not discharge him from that liability.

The witness was incompetent and consequently the ruling of the court below manifestly erroneous ; and for this cause the judgment of the county court must be reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS.
APRIL TERM, 1847.

PRESIDENT,

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG, } ASSISTANT JUDGES.
HON. CHARLES DAVIS,

NATHANIEL WEST v. ISRAEL CUTTING.

Where a sale of personal property is absolute, and there is no fraud, the vendee cannot compel the vendor to receive back the article, if it proves deficient in quality; but he must resort to his action upon the warranty, if there were one.

Where the defendant sold to the plaintiff a quantity of tea, which proved not to be good, and the plaintiff returned the tea to the defendant, who received it, and said that he should have some good tea soon and would replace it, to which the plaintiff assented, it was held, that this did not prove an absolute contract of rescinding, which would make the defendant debtor to the plaintiff, either for the money, or for the tea, unless called for; and that it imported no obligation, on the part of the defendant, to carry the tea to the plaintiff.

In such case the obligation of the defendant, being merely to deliver tea when called for, could not, by mere lapse of time, become an obligation to pay money.

But in this case, which was an action on book account, the facts being very indefinitely stated by the auditor, the report was re-committed.

West v. Cutting.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts as follows.

The plaintiff's account contained a charge for cash, five dollars;—and this was the only item, in reference to which controversy was had. This sum was sent by the plaintiff to the defendant for some tea. The tea was procured at the defendant's store, and was shortly after returned by the plaintiff to the defendant,—“it not being good.” The defendant received the tea, and said that he should have some good tea soon, and would replace the tea returned with good tea. The defendant retained both the tea and the money, and never delivered any other tea to the plaintiff, nor did the plaintiff ever call upon the defendant for any other tea.

The auditor allowed this sum to the plaintiff; and the county court, December Term, 1846,—Davis, J., presiding,—accepted the report and rendered judgment thereon for the plaintiff. Exceptions by defendant.

Merrill & Colby, Redfield and Peck for defendant.

1. The plaintiff had no right to *rescind* the contract, by tendering back the tea and demanding the consideration paid, there having been no fraud found on the part of the defendant.

2. If it be claimed, that the defendant, by receiving back the tea, has conceded the right of the plaintiff to rescind the contract, then his concession must be taken with the condition annexed, that the plaintiff should have *other tea*, in lieu of the tea returned; and it would seem there was a tacit assent, at least, to this arrangement, on the part of the plaintiff. *Weston v. Downs*, Doug. 23. 2 Com. on Cont. 66. But if we should concede that the contract was rescinded, no right of action would accrue to the plaintiff until after demand made. *Jones on Bail*. 52, n. *Brown v. Cook*, 9 Johns. 361. *Warner v. Wheeler*, 1 D. Ch. 159. *Topham v. Braddick*, 1 Taunt. 572. *Chadwick v. Divol*, 12 Vt. 499. *Stoddard v. Chapin*, 15 Vt. 443.

3. The action on book account will not lie to recover the \$5,00 for tea returned. If there be no right to charge on book at the time of the delivery of the property, no subsequent contingencies can give it. *Nason v. Crocker*, 11 Vt. 463. *Slason v. Davis*, 1 Aik. 73. *Hall v. Eaton*, 12 Vt. 510.

West v. Cutting.

Cooper and Johnson & Prentiss for plaintiff.

The money of the plaintiff is in the defendant's hands, which, *ex aequo et bono*, he ought not to retain. The sale was rescinded by mutual consent; but the money was not returned. The defendant agreed to replace the tea sent back; which he never did, although a reasonable time had elapsed before the commencement of this suit. It was money advanced on a contract, which the defendant neglected, or failed, to fulfil, and may be recovered back either in book account, or assumpsit for money had and received. *Rogers v. Miller et al.*, 15 Vt. 431. *Hickok et al. v. Ridley*, Ib. 42. *Stone v. Pulsipher*, 16 Vt. 428. *Giles v. Edwards*, 7 T. R. 181. *Weeks v. Hunt*, 13 Vt. 144. 1 Sw. Dig. 582. Book account and assumpsit are concurrent remedies, in such a state of facts. *Way v. Raymond*, 16 Vt. 371. *Weller v. McCarty*, Ib. 98.

No demand was necessary before suit brought. 1. Because a reasonable time had elapsed to return the money or send the tea. 2. Because the obligation rested peculiarly on the defendant. 3. Because it was a matter peculiarly within the defendant's knowledge, when he would have good tea; he was bound to replace the tea, when he received good tea, or to return the money; and the plaintiff was only bound to wait a reasonable time. Chit. on Cont. 732. 1 Chit. Pl. 362, 384. 10 Mass. 231. 16 Vt. 98. Ib. 87. 5 Vt. 451. 15 Vt. 42. 3 Vt. 58. 7 Vt. 223. 16 Vt. 372.

The opinion of the court was delivered by

REDFIELD, J. The questions of law arising in this case are nice, and not free from difficulty; and they are embarrassed with *inferences* of facts,—which can, *with propriety*, only be drawn by the auditor.

1. As the facts stand, the first inquiry is, could West compel Cutting to have taken the tea back? We think not. There is no pretence of any fraud on the part of Cutting, or of any agreement to take the tea back. The tea "was not good,"—a very uncertain definition of quality, and one which has been once held by this court to have no meaning, in a contract as to the quality of stoves; but the most, which could be made of it, is a warranty and a breach of it; which will only enable the vendee to recover damages for the breach, but will not entitle him to rescind and recover back the considera-

West v. Cutting.

tion. This is well settled, both in this country and England, *Thornton v. Wynn*, 12 Wheat. 183; 6 U. S. Cond. R. 508.

2. Was there any contract of absolute rescinding, so as to make Cutting a *debtor*, either for the money, or for the tea, *unless called for*? We think not. There was no claim for the money. The defendant said he should have some good tea soon and would replace it; and to this West assented;—for by the report it does not appear but that he was personally present; and if he were not, it would make no difference; but we must take it as it is,—to this taking tea again he assented.

3. Was Cutting, then, to carry the tea to West? The term “*re-place*,” used by the auditor, is not intended to determine this, we take it; for if so, he could have been more explicit, and would have been, if that had been his intention;—but this is either the language made use of, or its equivalent. We do not attach any such importance to it, as we might in a written contract; for here we cannot know, that he used that word. If he said he would let Mr. West *have some tea again*, or *pay him that amount*, five dollars, *in tea*, or he should have some tea that *would suit*,—which is more probable, perhaps,—ten witnesses, who heard it, would use, each, different language in relating it, and the auditor still different from all, perhaps;—so that all we understand the auditor to find on this point is, that the defendant said he would pay the plaintiff in tea again, and the plaintiff acceded to it.

We think it obvious, then, that the defendant was not bound to deliver the tea, until called for, (unless there was some understanding to that effect,—and if so, it should be found by the auditor,) for two reasons;—1, It is wholly inconsistent with the uniform custom and course of business in the country,—so much so, as to be almost ludicrous;—2, One quality of what was such tea as the defendant bought and sold had been sent and returned; there was, then, an improbability, that he would *send again*; he would naturally choose to have the plaintiff *see it* and suit himself. This, then, seems to us the exact legal obligation of the defendant, at the time the tea was returned, as the facts are reported by the auditor.

4. If this is the legal obligation, then, of the defendant, we do not see how it becomes an obligation to pay money by *mere lapse* of time. If the defendant *were* to send the tea, doubtless he should

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send it in a reasonable time ; and if he fail, he is liable in this form of action. But if the plaintiff is to *call and take* it, then the defendant is not liable, until *called upon*, or until he consents to let it go in account,—which is not found, and is not an inference of law, and not a probable inference of fact, if the defendant had at the time no account against the plaintiff.

But the important facts, in regard to this case, should be more definitely found by the auditor. We think there must have been some definite understanding of the parties, at the time, in regard to this item ; and that *should* govern, and it *can* be found by auditors ; we think more proper, that the case should be determined upon the understanding of the parties, *at the time*, than upon any mere technical *legal intendment*. For this purpose the case will be referred to auditors in this court.

Judgment reversed, and case referred to auditors.



CALVIN S. GROW v. ELIJAH ALBEE.

Where usury is included in mortgage notes, and a bill of foreclosure is brought, the defence, based upon the usury, must be made in that suit, or the decree will conclude the right. But if the *original contract*, evidenced by the mortgage notes, was not usurious, the *subsequent* payment of usury upon it has no legal connection with it; and the amount so paid may be recovered back in an action for money had and received, notwithstanding a decree of foreclosure may have been obtained, without any allowance for the usury so paid.

ASSUMPSIT for money had and received. Plea, the general issue, and trial by the court, June Term, 1846,—ROYCE, J., presiding.

On trial the facts appeared as follows. On the sixth day of February, 1841, the plaintiff gave to the defendant his note for \$50,00, payable the first of January next ensuing, with interest ; and on the ninth day of March, 1842, he paid to the defendant six dollars, for which the defendant endorsed on the note “one year’s interest.” The defendant also held another note against the plaintiff, dated

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October 29, 1839, for \$104,00, payable in one year from date, with interest; on which was endorsed, October 15, 1840, "one year's interest"—and October 16, 1841, "one year's interest and \$18,00 on the principal." At the time this last endorsement was made the plaintiff paid to the defendant thirty dollars. On the 17th day of March, 1842, the plaintiff substituted for these notes a new note for \$173,10, and gave a mortgage deed, to secure its payment, upon which a decree of foreclosure was afterwards obtained, for the full amount appearing due upon the face of the note; and the mortgaged premises were redeemed by payment of that amount.

The court found, that three dollars was paid, March 9, 1842, as usurious interest upon the note for \$50,00, and that six dollars was paid, October 16, 1841, as usurious interest upon the note for \$104, and rendered judgment for the plaintiff to recover the sum of nine dollars, and interest from the time of payment. It did not appear, that the plaintiff had demanded of the defendant the money so paid, prior to the commencement of this suit. Exceptions by defendant.

S. B. Colby and C. W. Prentis for defendant.

The county court erred, in not treating the decree in chancery upon the last note as a bar to this action. *Bearce v. Barstow*, 9 Mass. 45. *Thatcher v. Gammon*, 12 Mass. 268. The last note having been given on settlement of the first notes, and substituted for them, it is a continuation of the same transaction; and usury paid on the second security was allowed to be recovered in a declaration on the original contract. *Collins v. Roberts*, Brayt. 235. *Bridge v. Hubbard*, 15 Mass. 96. And the county court having found, that usurious interest was paid on the first notes, they became usurious. 15 Mass. 96. The payment of usury is evidence of an agreement to that effect. 1 Saund. R. 431, n. 1 Str. 498. *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cow. 715. The original notes being usurious, the last note became so; and the plaintiff might have made the usury a defence, *pro tanto*, to the suit in chancery;—and not having done so, he is concluded.

J. Cooper for plaintiff.

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The opinion of the court was delivered by

REDFIELD, J. The only question, in the present case, is, whether the plaintiff is concluded by the decree of foreclosure from recovering the usury paid upon the notes included in the decree. We have examined the subject, both in this case and that of *Day v. Cummings, ante*, page 496; and the result of that examination is a very full conviction, that the plaintiff, upon the facts found in the case, is entitled to recover.

From this case it does not appear, that the original contract was usurious. And we cannot *presume* that it was. The subsequent payment of usury, under any state of the law, will not *infect* the *original contract*. And had those notes been sued, they could not have been defended, under any state of usury laws before known in this state, upon the ground of the payment of usury subsequent to the giving of the note, and not in pursuance of the original contract. If, then, the notes given up were perfectly valid, and might have been enforced at law, so, also, was the substituted note, which was given simply for the old notes, not including usury.

And although, when the defendant brought his bill to foreclose, the plaintiff might, by way of answer, have insisted upon the usurious payments, as equitable grounds for reducing the amount of the decree,—as is said in *Ward v. Sharp*, 15 Vt. 118,—still the defendant was not bound to make the defence there; and if made, it is rather in the nature of an equitable offset, than of a technical payment. If the usury is included in the notes, which constitute the basis of the decree, then the defence *must* be made there, or the judgment will conclude the right. But that is upon the ground, that, *when the usury is included in the security*, it is not considered as paid, until the entire sum secured is paid; or rather, the first payments will go in extinguishment of the sum loaned, and the legal interest; and so the judgment upon the security, *for the last dollar only*, settles the right to retain the usury. So, too, money paid in obedience to a decree or judgment of court, is not, and cannot be esteemed, an *unlawful* payment. So, too, the judgment upon the security for the whole, or any part, of the money secured, *settles conclusively* the *validity* of the contract; and no recovery back can subsequently be had, which goes upon the ground of its *invalidity* and *illegality*.

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But when, for aught which appears, the contract was not originally tainted with usury, and when no such taint enters into its renewal, the payment of money, as usury, *eo nomine*, is the consummation of an unlawful payment and may be recovered back, whether the debt is paid, or not. It has no legal connection with the original contract or security whatever, and the right to retain it is in no way affected by any proceedings had in regard to the original security. See the following cases, as tending to confirm the views here taken. *Smith v. Bromley*, Doug. 697, n. *Dey v. Dunham*, 2 Johns. Ch. R. 191. *Johnson v. Johnson*, 11 Mass. 359. *Gaither v. Bank of Georgetown*, 1 Pet. 43. *Simpson v. Warren*, 15 Mass. 460. *Commonwealth v. Frost*, 5 Mass. 53. *Thatcher v. Gammon* 12 Mass. 268. *Scurry v. Freeman*, 2 B. & P. 381. The mere taking security for usury is not the offence, but the *payment* of it. *Thomas q. t. v. Cleaves*, 7 Mass. 361. And whenever the usury, *eo nomine*, is paid, the right to recover the excess is perfect, notwithstanding the debt may never be paid. *Lloyd v. Williams*, 3 Wils. 250. S. C., 2 Bl. R. 792. *Wade q. t. v. Wilson*, 1 East 195.

Judgment affirmed.

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JOSEPH OWEN, JR., v. DAN GRAY, ZD., and SILAS WHEELER, JR.,
Trustee.

The exemption from attachment and levy of execution, contained in chap. 42, sec. 18, of the Revised Statutes, of "such military arms and accoutrements as the debtor is required by law to furnish," is of a temporary character, as applied to the individual, to continue so long as the debtor is bound by law to furnish them; and when the obligation ceases, the exemption in the particular case ceases.

Where it appeared from the disclosure of a trustee, that he had in his possession certain military accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously absconded from the state, it was held, that he had ceased to be an officer, in

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consequence of his removal from the state, and that he was no longer under obligation to furnish these military accoutrements, and that consequently the state exemption, as to him, had ceased, and that the trustee should be helden chargeable for the articles.

TRUSTEE PROCESS. It appeared from the disclosure of the trustee, that he had in his possession certain military arms and accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously absconded from the state. The trustee also claimed, that the plaintiff had previously commenced a suit against him, as trustee of the principal debtor, and that a judgment had been rendered therein.

The county court, June Term, 1846,—ROYCE, J., presiding,—decided, that the trustee was chargeable for the property in his hands. Exceptions by trustee.

J. Cooper, for trustee, cited *Parks et al. v. Hadley & Tr.*, 9 Vt. 320; *Adams v. Newell & Tr.*, 8 Vt. 190; Rev. St. 240, § 13, art. 1—4; *Leavitt v. Metcalf*, 2 Vt. 342; and *Haskill v. Andros*, 4 Vt. 609.

_____, for plaintiff, insisted, that Gray, having absconded from the state, could not be considered as coming within the exemption in the Revised Statutes.

The opinion of the court was delivered by

KELLOGG, J. It is now objected by the trustee, to the judgment of the court below, that the articles of property in his hands, belonging to the principal debtor, are not subject to attachment; and consequently not liable to the trustee process.

This objection is founded upon the 13th section of chapter 42 of the Revised Statutes, which exempts from attachment and execution "Such military arms and accoutrements as the debtor is required by law to furnish;" and the cases of *Parks et al. v. Hadley & Tr.*, 9 Vt. 320, and *Adams v. Newell & Tr.*, 8 Vt. 190, are cited as authorities, to show that the property disclosed by the trustee in the present suit is not liable to the trustee process. Those cases are clearly distinguishable from the case at bar. The case of *Parks et al. v. Hadley & Tr.* establishes the general proposition, that personal prop-

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erty, exempted from the levy of execution, is not to be held in the hands of a trustee. The property sought to be charged by the trustee process consisted of household furniture. The case of *Adams v. Newell & Tr.* decides, that the money of a pensioner, in the hands of his agents, is not liable to the trustee process. These are cases of permanent exemptions of property from attachment, and apply to all persons, who may hold the same.

But in the case of military arms and accoutrements the law limits the exemption to such, as the "debtor is by law required to furnish." This, we apprehend, is an exemption of a temporary character, as applied to the individual, to continue so long as the debtor is bound by law to furnish them, and that, when the obligation ceases, the exemption in the particular case ceases. Such we believe to be the obvious meaning of the statute.

The question then arises, was the debtor, Gray, at the time Wheeler was adjudged his trustee, bound by law to furnish these articles? At that time Gray had absconded and left the state. His authority as an officer had ceased. The office of adjutant of the regiment was vacated by his removal from the state; and Gray, having ceased to be an officer, ceased to be under obligation to furnish these military arms and accoutrements, and consequently the statute exemption as to him ceased. The articles were therefore liable to the trustee process.

It is farther urged, that the plaintiff's cause of action was merged in a prior judgment, and that consequently the present suit should be barred. It is not necessary to enquire what would be the effect of such a fact, if it existed and were properly pleaded to the action, or whether the trustee could avail himself of such a defence, inasmuch as we are unable to discover any evidence in the case of the existence of such fact.

The judgment of the county court is affirmed.

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ROBERT H. IVES v. ELIJAH G. STRONG.

The principle, decided in the case of *Kidder v. Barker*, 18 Vt. 454, recognized and affirmed.

This was an action upon the case against a sheriff, for neglect in not collecting and returning an execution against three debtors, running against the body and property of one of them, and against the property of the other two. The defendant offered to prove, in mitigation of damages, that the debtor, against whose body and property the execution was issued, was, during the entire life of the execution, without the precinct of the officer, in Canada, and that no one of the debtors in the execution had any property, but they were absolutely bankrupt, that there was no *bail* on the original writ, in the action in which the execution issued, and no property attached, and that the plaintiff had not been damaged;—and it was held, that the evidence should have been received, and that, if true, the plaintiff was only entitled to recover nominal damages.

TRESPASS ON THE CASE against the defendant, as sheriff, for the neglect of his deputy, Samuel S. Kimball, in not collecting and returning an execution in favor of the plaintiff against Alpha Allyn, Anne Allyn and Jonathan Briggs. Plea, the general issue, and trial by jury, December Term, 1845,—ROYCE, J., presiding.

It appeared, that the execution was issued against the body and property of Alpha Allyn, and against the property of the other two execution debtors. A question was made as to the regularity of the execution;—but as it was not decided by the supreme court, the evidence upon that point need not be detailed. The defendant offered to prove, in mitigation of damages, that Alpha Allyn, during the whole life of the execution, was without the precinct of the officer, in Canada, and that no one of the debtors in the execution had any property, but that they were absolutely *bankrupt*; that there was no *bail* upon the original writ, in the action in which the execution issued, and no property attached; and that the plaintiff had not been damaged. To this evidence the plaintiff objected, and it was excluded by the court.

Verdict for the plaintiff, for the full amount of the execution, with interest from the time of the commencement of this suit. Exceptions by defendant.

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T. P. Redfield for defendant.

It is well settled, that, in an action against the sheriff for an *escape*, the plaintiff is limited to his *actual damages*, and the insolvency of the debtor is competent evidence. Rev. St. 455, § 13. *Treasurer of Vt. v. Weeks*, 4 Vt. 215. In an action on the case the usual rule of law requires the plaintiff to *allege* and *prove* his damages; yet in this case the plaintiff claims to recover damages, where none have been sustained. It is true, this court have held, in *Turner v. Lowry*, 2 Aik. 72, and in *Hall et al. v. Brooks*, 8 Vt. 485, that the plaintiff should recover the full amount of his execution;—but in the first case the ground of the decision seems to have been, that the plaintiff had lost his lien upon the *bail* by the neglect of the officer; and in the latter case the court seem to lay stress upon the fact, that the debtor was within the precinct of the sheriff, and the sheriff wilfully refused and neglected to execute the precept. But in the case at bar it was impossible for the sheriff to execute the precept, as commanded; and the ground of action is simply a non-return: What would have been the rule of damages, if the debtor had died, or had been sentenced to state's prison, or transported beyond seas, or—which is this case—had expatriated himself? Rev. St. 75, §§ 21, 22. 15 Johns. 454.

E. Paddock for plaintiff.

The phraseology of the Revised Statutes, as to the liability of a sheriff for not returning an execution, is the same with that of the statute of 1797; and our courts have uniformly adjudged, that the amount of the execution and interest should be the rule of damages. Tol. St. 312, § 10. Slade's St. 203, § 10. Rev. St. 75, § 21. The execution debtor might have been out of the state during the life of the execution by connivance with the officer; neither that fact, nor the poverty of the debtors, prevented the officer from returning the execution. In relation to the rule of damages *Turner v. Lowry*, 2 Aik. 72, may be regarded as a leading case, as it reverses *Stevens v. Adams*, Brayt. 29. And see, to the same effect, *Hall et al. v. Brooks*, 8 Vt. 485, and *Walkinson v. Bennington*, 12 Vt. 404.

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The opinion of the court was delivered by DAVIS, J. The recent case of *Kidder v. Barker*, 18 Vt. 454, recognizing an exception to the well established rule in this state, that, in actions on the case against sheriffs for not collecting or returning final process, the plaintiff is entitled to recover the full amount of the execution, must control the present case. The two cases are almost precisely the same,—at least so far as respects Alpha Allyn, the principal execution debtor. Assuming the facts, offered to be proved in respect to the other two debtors, to be true, as we must for the present purpose, there can be no question, but that the whole case falls within the admitted exception. The testimony offered in the county court, and excluded, should have been received.

As this opens the case for trial, it becomes unnecessary to pass upon the objection raised against the regularity of the execution.

The judgment of the county court is reversed, and the case remanded for trial, unless the plaintiff consents to take a judgment for nominal damages and costs; in which case the judgment, so modified, will be affirmed, with costs to the defendant in this court, to be deducted from the plaintiff's costs.

The plaintiff's counsel declined taking a judgment for nominal damages, and the case was remanded.

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GEORGE NYE and LUCIUS S. NYE v. SABIN KELLAM.

[Same Case, 18 Vt. 594.]

It is no defence to an action against a sheriff for not levying and returning an execution, that it had been agreed between the plaintiff and the execution debtor, that the balance due upon the execution should be charged to the execution debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies, without evidence that the amount had been actually paid, or adjusted, by a settlement of the current account embracing it.

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TRESPASS ON THE CASE against the defendant, as sheriff, for the default of his deputy, John Locke, in not levying and returning an execution in favor of the plaintiffs against Charles M. Cowles. Plea the general issue, and trial by jury, June Term, 1846,—Royce, J. presiding.

It appeared, that the execution in question was delivered to Locke September 25, 1840; and the defendant offered to prove, that in March, 1842, an arrangement was entered into between the plaintiff George Nye and the execution debtor, Cowles, that the balance due upon the execution should "go in account between them." To this evidence the plaintiff objected; but it was admitted by the court;—and this was all the evidence upon this point.

The court instructed the jury, that, if they should find that the execution had not been fully paid by Cowles to the plaintiffs, or one of them, the plaintiffs would be entitled to a verdict for the balance, unless there was an agreement between Cowles and the plaintiffs, or George Nye, that the balance should be transferred to the account of Cowles, and adjusted with their other debt, and that agreement mutually understood to be in discharge of all other liabilities and remedies;—but that, if they should find such an agreement was made, and that such an effect was mutually intended by it, then they would be at liberty to return a verdict for the defendant, on the ground of payment, or satisfaction, of the execution by Cowles to the plaintiffs.

Other points were made upon the trial and argued by the counsel; but no decision was made upon them by the supreme court. —

Verdict for defendant. Exceptions by plaintiffs.

J. Cooper and T. P. Redfield for plaintiffs.

The arrangement between Cowles and George Nye was without consideration and void. It is but the common case of accord without *satisfaction*,—which has been uniformly held to be no discharge of the existing liability. *Bates v. Starr*, 2 Vt. 536. *Bryant v. Gale*, 5 Vt. 416. Smith's Leading Cases, Tit. "Accord and satisfaction."

C. W. Prentiss for defendant.

It was competent for one of the plaintiffs to control the execution, or to receive the pay upon it and give a discharge, or to settle

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it by its going into account; and the charge of the court upon this point was clearly correct.

The opinion of the court was delivered by

DAVIS, J. This case came before this court on exceptions at the last term; when, after a verdict and judgment for the plaintiffs, a new trial was granted. 18 Vt. 594. It now comes before us, in the same manner, after a verdict and judgment for the defendant. The only point, upon which it is now necessary to pass, involves the admission, by the court, of evidence intended to show, that, after the sheriff had become liable for the default of his deputy, Locke, an arrangement had been entered into between one of the plaintiffs and the original debtor in the execution, Cowles, to the effect that whatever balance might be due on the execution should be passed in account between the parties, and the subsequent charge of the court in reference to that evidence. The charge, in substance, was, that, if they found it was agreed that such balance should be transferred to the account of Cowles, and adjusted with their other debt, and that agreement mutually understood to be in discharge of all other liabilities and remedies, the jury would be at liberty to regard this as payment, or satisfaction, of the execution.

We think the ruling of the court, in admitting this evidence, unaccompanied by evidence to show that this balance had been actually paid or adjusted by a settlement of the current account embracing it, was erroneous; as was also the charge embodying the same principle. A mere executory agreement to pay the execution in that form could have no other legal effect, than an unexecuted agreement to pay it by the execution, or indorsement, of a promissory note, or the acceptance of a bill, or even a naked promise to pay the money at a future day. Such agreements can never be relied upon as satisfaction. They must be pleaded in bar of the original liability; nor do they present a distinct ground of action in themselves.

It is obvious, that such an item would constitute no proper subject of book charge; the arrangement could not be enforced in that form; besides it is without consideration, and would fail on that ground. Should this defence be allowed to prevail, the plaintiffs would be without legal remedy for the balance due them, unless their debt-

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or should voluntarily consent to account for it on settlement. See *Bryant v. Gale*, 5 Vt. 416, where the subject of accord and satisfaction was quite fully considered. The defence set up there, and which was allowed to prevail, was a new contract under seal, to accept a horse, if delivered by a certain time, in satisfaction of the several promises mentioned in the declaration. The case turned entirely upon the circumstance, that the substituted contract was under seal.

The judgment of the county court is reversed, and a new trial ordered.

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DAVID S. ABBOTT v. SAMUEL S. KIMBALL AND SAMUEL JEWETT.

Where property, attached upon mesne process, is sold by the attaching officer, a deputy sheriff, upon the writ, in pursuance of the Revised Statutes, chap. 28, §§ 48-52, and judgment is finally rendered in favor of the defendant, in the action in which the attachment was made, a refusal, on the part of the officer, to pay to the defendant the amount, for which the property was sold, will not render him a trespasser *ab initio*, so as to render him liable in trover for the property.

The only proper action against the deputy, in such case, is for money; and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer.

And if the deputy, in such case, made the sale without notifying the defendant in that action, this would not make the attaching creditor jointly liable with the deputy, in any way, unless he did something more than request a sale. The mere joining with the deputy in a special plea, where they have been sued jointly in trover for the property, when there is also a general several plea upon the record, will not involve the creditor with the officer, nor excuse the court from giving proper instructions to the jury, as to all the points in the case, as to both defendants, *considered separately*, whether particularly requested upon all the points, or not.

Trespass on the case, for any mere non-feasance of the deputy, will only lie against the sheriff.

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An attaching creditor can in no case be held jointly liable with the officer, for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it.

Where property has been attached, and final judgment is rendered in favor of the defendant in the suit in which the attachment was made, *trover* will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property attached.

In order to sustain an action for an excessive attachment of property upon a writ, the plaintiff must allege and prove much the same, that he would in a suit for a malicious action,—that is, want of probable cause and malice express;—and the attaching creditor will ordinarily be the only person liable to such action.

THIS was originally an action of trover for four horses and five harnesses. After judgment for the plaintiff and review by the defendants, the plaintiff, by leave of the court, amended his declaration by filing several additional counts in case. In the first count the plaintiff alleged, that on the 25th day of November, 1842, the defendant Jewett and one Strong, then his partner, but since deceased, sued out their writ of attachment against the plaintiff, demanding, as damages, sixty dollars, and commanding the sheriff to attach the property of the plaintiff to the value of eighty dollars, and delivered the said writ to the defendant Kimball, a deputy sheriff, to serve and return, and that Kimball attached thereon five harnesses and four horses belonging to the plaintiff; that such proceedings were had in that suit, that the plaintiff, Abbott, recovered final judgment therein, in his favor; and the plaintiff averred, that it was the duty of the defendants to have carefully kept and preserved the said harnesses,—but that, in fact, they had neglected to keep them with care, but had suffered them to become rotten and worthless.

In the second count the matter of inducement was the same; and the plaintiff alleged, that Kimball, after he had served and returned the writ against the plaintiff, by the direction and procurement of Jewett, sold the four horses attached for the sum of sixty two dollars, and that this was done without the knowledge or consent of the plaintiff, Abbott, and that, after final judgment had been rendered in favor of Abbott in that suit, he demanded the horses of the defendants,—but that they had refused to deliver them to him, or to pay him their value, or to pay him the sum for which they were

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sold. In the third count the matter of inducement was substantially the same; and the plaintiff averred, that the property was attached by Kimball, by the direction of Jewett, and that its value was very much larger, (at least five times larger,) than the whole amount which Jewett and Strong claimed to recover in that suit, and that so great an amount of property was taken for the purpose of embarrassing the plaintiff and putting him to great expense and trouble.

The defendants pleaded the general issue, and also pleaded specially, setting forth the facts in reference to the suit in favor of Jewett and Strong against the plaintiff, as alleged in the declaration, and then averring, that, after the attachment, the plaintiffs in that suit applied to the defendant Kimball to sell the horses, in pursuance of the statute; that Kimball notified Abbott of this application, and then caused the horses to be appraised, and sold them for \$62,00, pursuing in all respects the requisitions of the statute,—Rev. St. chap. 28, sec. 48—52,—describing particularly the steps taken; that the expenses of keeping and selling the horses amounted to \$20,54; and that, after final judgment had been rendered in that suit in favor of Abbott, Kimball tendered to Abbott the amount for which the horses were sold, deducting the said sum of \$20,54, and delivered to him the harnesses,—having safely and properly kept them. The plaintiff replied, traversing all the facts alleged in the plea.

Trial by jury, December Term, 1845.—ROYCE, J., presiding.

On trial the plaintiff gave in evidence the files and records in the original suit against him in favor of Jewett and Strong; and also gave evidence tending to prove, that, soon after final judgment had been rendered in his favor in that suit, he demanded of the defendants the horses, or the amount at which they had been appraised, and the harnesses; and that the defendants then offered to the plaintiff the amount for which the horses had been sold, deducting the expenses of keeping and sale, and also offered to the plaintiff the harnesses,—all which the plaintiff refused to receive. The plaintiff also gave evidence tending to prove, that the harnesses had not been carefully kept by Kimball after they were attached, and that they had thereby become greatly reduced in value.

The defendants then gave evidence tending to prove all the facts alleged in their plea in bar, and also, that Kimball had not been guilty of any want of ordinary care in keeping the harnesses.

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The court instructed the jury, that, if the defendants had proved all the facts alleged in their plea in bar; the sale of the horses by Kimball was a legal sale, under the statute, and that, in that event, they would return a verdict against both defendants for the sum for which the horses were sold by Kimball, with interest from the time of the demand, and that Kimball had no legal right to deduct from that amount either the expenses of keeping the horses before the sale, or the costs of the sale ;—that, if the jury did not find all the facts alleged in the plea substantially proved, especially the alleged notice, from Kimball to the plaintiff, that application had been made to him to have the horses appraised, &c., under the statute, (which was the only contested fact alleged in the plea in relation to the horses,) they would then consider the original declaration in trover supported in regard to the horses, and would return a verdict in favor of the plaintiff for the value of the horses, with interest from the time of the sale by Kimball, and that they would be at liberty to adopt the appraisal as evidence of the value, if they thought proper ;—that, if they found that the harnesses had been kept by Kimball, after the attachment, with ordinary prudence and care, and that they had not depreciated in value from the want of such care, then the plaintiff could not recover any thing for the harnesses ; but that, if they found that Kimball had not kept and preserved the harnesses with such care and prudence, they should add such sum to their verdict, as they found the harnesses had depreciated in consequence of the want of such care and prudence ;—and that, if they found that the attachment of property, made by Jewett and Strong upon their writ against Abbott, was unreasonable and extravagant, in reference to the amount of their claim against him, and made with a view to perplex and harrass him, they could add to their verdict such sum, as they should consider the plaintiff had suffered from the excessiveness of the attachment.

The jury returned a verdict against both defendants for \$171,00 ; and after verdict the defendants moved in arrest of judgment for the insufficiency of the plaintiff's declaration. The court overruled the motion and rendered judgment for the plaintiff upon the verdict. Exceptions by defendants.

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Poland for defendants.

I. If the jury found, that Kimball gave no notice to the plaintiff of the application of Jewett and Strong to have the horses sold, that would give the plaintiff no right to maintain any action against Jewett. The property was in the custody of Kimball, the officer, and Jewett had a legal right to apply to him to have it sold; and if, in the course of the proceedings, the officer was guilty of any error, or omission of duty, Jewett is not responsible therefor. *Barnard v. Stevens et al.*, 2 Aik. 429. It may be said, that, as the defendants joined in a plea of justification, and that failed as to one, it failed as to the other, also; but in this case the general issue was also pleaded, and all the evidence was equally applicable to that issue,—which is always several.

II. If the sale of the horses was regular and legal, the defendants contend:—

1. That no action sounding in *tort* can be sustained,—that if the officer, upon the termination of that suit in favor of the defendant therein, refused to pay over the avails of the property to him, the remedy must be in form *ex contractu*:—

2. That, at all events, Jewett is not liable. The property was legally attached, and was disposed of under the statute; so that no action can be sustained for that. The officer holds the money, until the suit is terminated in favor of the defendant; and the plaintiff in that suit, who never had, and was never entitled to have, the custody of that money, can in no manner be held liable for it. The statute,—Rev. St. 185, § 46, provides, that “the proceeds of the sale, after deducting the necessary charges thereof, shall be held by the officer, subject to the attachment, or attachments, and shall be disposed of in like manner, as the same property would have been held and disposed of, if it had remained unsold;” and section fifty of the same chapter, which governs this case, provides, that “the proceeds thereof shall be held and disposed of in the manner before provided in case of a sale by the consent of the parties, unless” &c. If, then, the sale be according to the directions of the statute, the *proceeds* have taken the place of the horses, and the accountability of the officer is the same, as for the property itself, if it had remained in his hands. *Adams v. Abbott*, 2 Vt. 383.

III. The officer had a right to deduct, from the sum for which

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the horses were sold, the expenses of the keeping and the charges of the sale. While the property was under attachment in the officer's hands, the defendant was bound to pay the expenses of keeping; and if he would avoid this, he should either replevy it, or have it receipted. *Dean v. Bailey*, 12 Vt. 142. *Jackson v. Scribner*, cited in Ib. At all events, the officer is entitled to deduct the charges of the sale; for such is the express language of the statute.

IV. If Kimball neglected to take proper care of the harnesses, while under attachment, this, being a mere non-feasance, would not make him a trespasser *ab initio*. And Jewett can in no way be made liable for this neglect; for he had nothing to do with the harnesses after the attachment.

V. The third count added to the declaration, for making an excessive attachment, is fatally defective.

1. There is no allegation of malicious motive in Jewett.
2. It is not alleged, that the property was removed from the plaintiff's possession by the defendants, or either of them.
3. There is no allegation of damage in any manner.

J. Cooper for plaintiff.

The jury were correctly instructed, that, if the facts alleged in the plea in bar were found substantially true, the plaintiff was entitled to recover against both defendants.

The case shows, that the plaintiff demanded the horses, or their appraised value, of the defendants,—not of one of them,—and that the defendants made a tender of the avails of the sale, after deducting the expenses of keeping and selling. These were acts of the defendants jointly, for Jewett's benefit; for he was liable for the expenses. *Johnson v. Elson*, 2 Aik. 299. *Felker v. Emerson*, 17 Vt. 101. It makes no difference in principle, that Jewett chose to have the property sold, under the statute. The statute does not change the rights of the parties, by divesting the defendant of his property, when attached, provided he should eventually recover. The property was absolutely discharged by the judgment, and Jewett was bound to pay the sheriff's expenses. *Felker v. Emerson*, 17 Vt. 101. The act of applying the proceeds of the sale for this purpose was for Jewett's benefit, and he participated in it. This makes him guilty of a legal conversion. 3 Stark, Ev. 1590. No claim

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appears to have been made in the court below, that, if one of the defendants was liable, both were not liable; and the question should not be entertained here, unless it appears that it was distinctly passed upon in the court below. *Barnard v. Stevens et al.*, 2 Aik. 429. 2 Vt. 383. In the case of *Lamb v. Day et al.*, 8 Vt. 407, this question was presented; and it would seem, that that was a stronger case for the defendant Day, than this is for Jewett. In this case it does appear, affirmatively, that Jewett did intermeddle with the property after the attachment; and even when the property was demanded, he did not deny having the control of the matter. In this particular this case differs from that of *Adams v. Abbott*, 2 Vt. 383.

The last count in the declaration states sufficiently a cause of action; it has been traversed and a verdict has passed; and no substantial reason appears, why the judgment upon the verdict should not be affirmed. *Battles v. Braintree*, 14 Vt. 348. Arch. Pl. 163. 1 Salk. 365.

The opinion of the court was delivered by

3 REDFIELD, J. There are numerous points in this case, upon some of which the court are not fully agreed. But having no difficulty in reference to many, we think it best to determine those.

1. The court charged the jury, that although the defendants made out all the facts alleged in their plea in bar, still the plaintiffs might recover, *in this form of action*, the amount of money for which the horses were sold, and interest from the time of the demand. No doubt, if the officer had no right to deduct the expenses of keeping and sale,—of which we say nothing, (not being agreed fully,—) the *officer* might be liable, in some form of action, for that amount. But it seems to us,—1, That in that case the officer is not liable in *trover*. A refusal to pay over the money, or claiming to retain part of it, upon grounds which are not well founded in law, will not make him a trespasser *ab initio*. And unless that is the case, *trover* will not lie, *even against the officer*. It is like any other refusal to pay over money in his hands. 2. That *trespass on the case*, for any mere *non-feasance* of the deputy, will only lie against the sheriff,—this never being sufficient to make him a *tort-feasor ab initio*. 3. That in no case can the creditor be jointly liable for any wrong of the officer, unless he in some way participated in it, or rati-

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fied and confirmed it, after becoming aware of it. 4. That the only proper action, in this view of the case, against the deputy, is for money; and in that action the creditor cannot be joined, unless he has been jointly concerned in the detainer.

2. The court also charged the jury, that, if the officer made the sale without notifying the defendant, he did make himself a trespasser *ab initio*. But this will not make the creditor liable in any way, unless he did something more than request a sale,—which will be considered a *legal sale*. Possibly, if the creditor partakes in the wrong, or justifies it after knowing it, he should be held as a trespasser *ab initio*. But nothing of this kind appears in the case; and the mere joining in a special plea in bar, when there is also a general several plea on the record, under which all this defence is competent, will not involve the creditor with the officer, nor excuse the court from giving proper instructions to the jury, as to all the points in the case, as to both defendants *considered separately*, whether particularly requested upon all the points, or not.

3. As to neglect in keeping the harnesses, the plaintiff doubtless has some remedy; but not in *trover*, it would seem.—1, For reasons already assigned, being mere non-feasance;—2, For the same reason the remedy in case should be against the sheriff;—and 3, The creditor cannot be joined, unless he participated in the wrong.

4. In regard to the right to sue for an excessive attachment, the questions as to the sufficiency of the proof and the declaration may be considered together. We think the plaintiff, to make his case, must allege and prove much the same, that he would in a suit for a malicious action,—that is, *want of probable cause and malice express*. In this view of the case it seems somewhat absurd to expect to involve the officer. The *party*, ordinarily, will be the only one liable. We have not examined critically, to see whether the proof or the allegations come up to this requisition of the law upon this point.

Judgment reversed, and case remanded for a new trial.

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JOSEPH WHEELOCK v. SILAS SEARS.

The statute,—Rev. St., c. 106, § 16,—which provides, that, if an officer shall receive any greater fees than provided for by law, he shall pay to the person aggrieved ten dollars for each dollar excess of fees so received, and in the same proportion for a greater or less sum, is a penal statute, and, as such, is embraced in section six of chapter fifty seven of the Revised Statutes, limiting the time, within which actions may be brought, to four years; and, consequently, an action, brought by a person aggrieved by the taking of illegal fees, for the purpose of recovering the penalty, comes within the provision of section nine of chapter fifty seven of the Revised Statutes, requiring a minute to be made upon the writ of the day, month and year when the same was signed.

The minute required by that statute,—Rev. St. c. 57, § 9,—must be made at the time the writ is signed;—if made subsequently it is insufficient.

But the objection, founded upon the want of such minute, like any ordinary matter in abatement, if not insisted upon at the earliest opportunity, is waived. If the action is commenced before a justice of the peace, the motion to dismiss, founded upon the want of such minute, must be made at the return day of the writ.

If such objection is not taken at the return day of the writ, it is waived, although the parties, after the writ was served, agreed to substitute another day for the return day, but without any express reservation of the right to insist upon this dilatory matter.

When a case came into the county court by appeal, the records of the justice, as well as the writ, service, pleadings, &c., are always to be treated in the supreme court as part of the case, though not specially referred to in the bill of exceptions.

THIS was an action founded upon the statute,—Revised Statutes, chap. 106, sec. 16,*—against taking illegal fees, brought by the plaintiff as the party aggrieved, the defendant being a deputy sheriff, and was commenced before a justice of the peace, and came to the county court by appeal. The original writ was made returnable April 11, 1845; and no minute was made upon it, at the time it

*Which enacts, that, "If any officer, or other person, shall receive any greater fees than is provided for by law, he shall pay to the person aggrieved ten dollars for each dollar excess of fees so received, and in the same proportion for a greater or less sum."

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was signed, of the day, month and year when it was signed ; but on the return day of the writ a minute was made upon it by the magistrate, that it was exhibited to and signed by him the twenty second day of March, 1845. The record made by the magistrate showed no continuance of the case from the eleventh day of April, but stated, that the case came on for trial on the twenty-first day of April, 1845, and that on that day the defendant moved that the suit be dismissed, for the reason that the minute required by the statute was not made upon the writ at the time it was signed. This motion was overruled by the magistrate ; and, when the appeal was entered in the county court, the motion was renewed.

The county court, June Term, 1845,—Royce, J., presiding,—ordered the suit dismissed. Exceptions by plaintiff.

— for plaintiff.

1. The motion to dismiss was made too late ; the rule in relation to pleas in abatement applies. 16 Vt. 604.

2. The statute does not require a minute to be made at the time of signing, as in case of an indictment. Rev. St. 472, § 16. Ib. 304, § 6. Ib. 469, § 26.

3. This is not an action for a penalty, or a penal forfeiture. It is for accumulated damages. It is a bar to an action for the excess of legal fees. It is remedial. It is not a “penalty, or forfeiture, given in whole or in part to the party aggrieved.” A *qui tam* action for the penalty, in case of a fraudulent conveyance, is an instance of this ; the moiety of the penalty, which belongs to the creditor, does not go to reduce his debt. For these reasons no minute is necessary. *Woodgate v. Knatchbull*, 2 T. R. 148. *Colburn v. Strett*, 1 Metc. 232. *Wiley v. Yale*, 1 Metc. 553. *Goodridge v. Rogers*, 22 Pick. 495.

C. Story and Poland for defendant.

The statute,—Rev. St. c. 57, § 9,*—contains a clear statement of the time when the minute required by it shall be made,—that is,

*Which enacts, that “ When any action shall be commenced, in any of the cases mentioned in this chapter, the clerk or magistrate, signing the writ, shall enter upon it a true minute of the day, month and year, when the same was signed.”

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"when any action shall be commenced," &c. In section eight of the same chapter, which refers to criminal proceedings, it is expressly required, that the minute shall be made "*at the time of exhibiting,*" &c.; and in section ten of the same chapter* the provisions of sections eight and nine are referred to, as being identical; and the want of the proper minute, in each case, has the same effect and is to be taken advantage of in the same manner. If the position taken by the plaintiff is correct, as to the proper construction of section nine, then the provision of section ten, so far as it relates to section nine, is nugatory; for if the defendant make no motion to dismiss at his first appearance in the case, the want of the minute is waived; and if he make such a motion, the plaintiff may then have the minute made, and so cure the defect. The question is substantially decided in *Montpelier v. Andrews*, 16 Vt. 604, and in *Pollard v. Wilder*, cited in a note to that case.

It is urged, also, that the exceptions and the papers made part of the exceptions do not show that the motion to dismiss was made at the return day of the writ, and before the cause had been continued. It is for the party excepting to show, by his exceptions, that error has intervened; and unless he do so, this court will presume, that the county court decided properly. *Mattocks v. Bellamy*, 8 Vt. 463. *Richardson v. Denison*, 1 Aik. 210. *Eaton v. Houghton*, Ib. 380. *Adams v. Ellis*, Ib. 24. *Stearns v. Warner*, 2 Aik. 26. *Russell v. Fillmore*, 15 Vt. 130. 17 Vt. 48.

The opinion of the court was delivered by

DAVIS, J. This action was originally commenced before a justice of the peace, and came into the county court by appeal. It was brought by the plaintiff, as the party aggrieved, to recover a penalty of ten fold for taking illegal fees as a deputy sheriff, and was made returnable April 11, 1845. No minute of the day, month and year, when the writ was signed, was entered upon it, by the magistrate, at the time of signing; but on the return day of the writ a minute, in the usual form, was entered on the back thereof, asserting that it

*Which enacts, that "every bill, complaint, information, indictment, or writ, on which a minute of the day, month and year shall not be made, as provided by the two preceding sections, shall on motion, be dismissed.

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was exhibited to and signed by him on the twenty-second day of March, 1845. It appears by the justice's records, copies of which were filed in the county court, that, on the 21st of April, the case came on for trial before the magistrate, and at this time a motion was made by the defendant to dismiss the case, on the ground that the requisite minute was not made at the time of signing,—which motion was overruled, and the defendant was ordered to answer over. On entering the case in the county court the motion to dismiss was renewed, and that court ordered the suit to be dismissed, to which decision the plaintiff excepts. Several questions have been made in argument.

1. It is insisted, that this action is not for a penalty, or forfeiture, and so is not comprehended in any section of chapter fifty-seven of the Revised Statutes, and does not, consequently, come within the purview of section nine, requiring a minute to be made. The cases cited from Massachusetts simply show, that actions, in which double or treble damages may be recovered, are not, in their courts, regarded as penal actions. We have no doubt whatever, but that our statute,—Revised Statutes, chap. 106, sec. 16,—is to be regarded as a penal statute, and, as such, is embraced in section six of chapter fifty-seven, limiting the time, within which actions may be brought, to four years.

2. It is farther contended, that the statute does not, in terms, require the minute to be made *at the time of signing the writ*; but that, if made subsequently, it will satisfy the law. This proposition, however, we are satisfied cannot be sustained. The eighth section says, when any bill, complaint, &c., shall be exhibited, in any cases referred to, the clerk or magistrate, to whom it shall be exhibited, shall, *at the time of exhibiting*, make a minute, &c. In the ninth section the language is, *when any action shall be commenced*, the clerk or magistrate, signing the writ, shall enter upon it a true minute, &c. This is no less explicit, than the preceding section, as to the time when the minute is required to be made.

3. A farther position is taken by the plaintiff's counsel, in opposition to the motion to dismiss, which we are satisfied, upon consideration, must be sustained. It is, that the motion was not seasonably interposed, and that the objection, like any ordinary matter in abatement, if not insisted upon at the earliest opportunity, is

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waived. The motion to dismiss the action should have been made at the return day of the writ, which was, as already stated, the 11th day of April, provided the defendant had legal notice of the suit,—as we understand in the argument was the fact, although the copies, with which we are furnished, omit the service of the writ altogether.

It has been insisted by the defendant's counsel, that the copies filed with the clerk contain no evidence of any continuance of the case from the 11th of April to the twenty-first of April, nor any explanation of the cause or manner of the postponement. This is true. But however it may have occurred, whether by a regular continuance, or by mutual consent, treating the latter day, instead of the former, as the return day, the result would be the same, unless there were an express reservation of the right to insist on this dilatory matter,—which does not appear and is not pretended.

The defendant's counsel have farther insisted, that the court have no means of ascertaining at what time the motion to dismiss was originally made, inasmuch as the justice's records are not specially referred to as a part of the case in the bill of exceptions. No such reference was necessary. These records, as well as the writ, service, pleadings, &c., are always to be treated as a part of the case, when it comes into this court on exceptions. Other documents and writings, used on the trial as matters of evidence, must be specially referred to and made a part of the case, or they will not be noticed.

In favor of the position, that an objection of this sort is treated like any ordinary matter in abatement, in respect to the time of urging it, the case of *Pollard v. Wilder*, 17 Vt. 48, affords a decisive authority. That case cannot be distinguished from the present. In the case of *Montpelier v. Andrews*, 16 Vt. 604, the objection was seasonably taken; a circumstance evidently regarded as material.

The defendant, therefore, in this case, when he filed his motion to dismiss before the magistrate, had lost the right to avail himself of this matter, which, if seasonably brought forward, would have constituted a good defence to the plaintiff's action. The judgment of the county court must therefore be reversed, and the cause be remanded for trial.

Smith, *q. t.*, v. Kinne.

ABIAL M. SMITH, *qui tam*, v. NATHAN KINNE, Jr.

In a *qui tam* action, brought to recover the penalty given by the statute for receiving a fraudulent conveyance, the plaintiff cannot recover without showing that the deed was made and received with a fraudulent intent, which existed in both parties. If the defendant received the deed in good faith, for the purpose of securing a debt due to him, he would not thereby subject himself to the penalty.

Where it was alleged in the declaration, in such case, that the defendant received the deed fraudulently, and it appeared that he had subsequently conveyed the land to a third person, at the request of the grantors, and the court instructed the jury, that, if the intent of the defendant in receiving the deed was not fraudulent, still if the intent of the grantors, in conveying to him, was fraudulent, and he was aware of that intent, his conveyance of the land to the third person shifted the burden of proof upon him, and rendered it necessary for him to prove that he executed that deed in good faith and with no fraudulent purpose, and that, upon the failure of such proof, he must be presumed to have conveyed away the land with intent to defraud the plaintiff, it was held, that the intent, with which the conveyance to the third person was made, was not within the issue, and that the instructions to the jury were erroneous.

THIS was an action to recover the penalty given by the statute for receiving a fraudulent conveyance. The plaintiff alleged in his declaration, that the defendant, on the fourth day of August, 1842, received a deed of certain land in Newport from Jesse H. Goodwin and Matthew E. Goodwin, with intent to defraud the plaintiff of debts due to him from Jesse H. Goodwin. Plea, the general issue, and trial by jury, June Term, 1844,—Royce, J., presiding.

On trial the plaintiff gave in evidence a warrantee deed of the land in question, from Jesse H. Goodwin and Matthew E. Goodwin to the defendant, dated August 4, 1842; a warrantee deed of the same land from Julia Wheelock to Jesse H. Goodwin and Matthew E. Goodwin, dated January 18, 1840; and a quit claim deed of the same land from the defendant to Julia Wheelock, dated November 4, 1842. The plaintiff then gave evidence tending to prove, that Jesse H. Goodwin and Matthew E. Goodwin, at the time of making the conveyance to the defendant, were in possession of the premises described in the declaration, claiming to own them in fee, that Jesse H. Goodwin was indebted to the plaintiff, that the defendant receiv-

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ed the said conveyance with intent to defraud the plaintiff of his debt, that the defendant justified the conveyance to be made for good consideration, and that he made the conveyance to Julia Wheelock with the like intent to defraud the plaintiff.

The defendant gave evidence tending to prove, that he received the conveyance for the purpose of securing a debt of about \$25,00, due to him from Jesse H. Goodwin, that the deed to him was intended as a mortgage, that at the time of receiving it the defendant executed a writing of defeasance, that Jesse H. Goodwin subsequently paid the debt due from him to the defendant, and that the defendant afterwards, at the request of Jesse H. Goodwin, executed the conveyance to Julia Wheelock. The defendant also offered evidence tending to prove, that, at the time he executed the conveyance to Julia Wheelock, she had undertaken to become jointly holden with Jease H. Goodwin to the plaintiff for the amount of the debt due to the plaintiff, and that the defendant consented to execute that deed, with the understanding that she was thus jointly holden ; but it appeared, that, during all this time Julia Wheelock was a married woman, and that this was well known to the defendant.

The defendant then offered to prove, that the title of Jesse H. Goodwin and Matthew E. Goodwin to the land in question was by virtue of a vendue deed, that the vendue was defective, and that the land was still claimed under the original proprietor. To this evidence the plaintiff objected ; and it was excluded by the court.

The court instructed the jury, that even if the defendant had not a fraudulent purpose in taking the deed from the Goodwins, such as would subject him to the penalty claimed in this action, still, if the intent of the Goodwins in conveying to him was fraudulent, and he was aware of that intent, by his conveying the land to Julia Wheelock the burden of proof became shifted, and it was incumbent upon him to prove that he executed the deed to her in good faith and with no fraudulent purpose, and that, on failure of such proof on the part of the defendant, he must be presumed to have conveyed away the land with intent to defraud the plaintiff. The jury were also instructed, that, if they returned a verdict for the plaintiff, it must be for the value of one half of the land conveyed,—that being the share which Jesse H. Goodwin owned therein.

Verdict for plaintiff. Exceptions by defendant.

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B. H. Smalley and S. B. Colby for defendant.

The charge of the court is objectionable.

1. In order to render the defendant liable to the penalty, the conveyance from the Goodwins to him must have been fraudulent; and unless it was so, the defendant cannot be made liable for aliening the land to Julia Wheelock. But the charge places the case upon the ground, that the defendant is liable for aliening the land, though he may have received the conveyance from the Goodwins without any fraudulent intent. *Brooks* q. t. v. *Clayes et al.*, 10 Vt. 37. *Maxx* q. t. v. *Howell et al.*, 4 East 1. 4 Bl. Com. 232.

2. The charge makes the mere fact of the defendant's conveying *to Julia Wheelock *prima facie* evidence of a fraudulent intent; and on this charge, if the jury found, from the evidence, that the defendant received the deed from the Goodwins *bona fide*, and that he conveyed to Julia Wheelock, and there were no other evidence in the case, they would be bound to find the defendant guilty.

3. The plaintiff has not, in his declaration, charged the defendant with aliening the premises to Julia Wheelock with intent to defraud the plaintiff; and this point is not in issue by the pleadings.*

Story and C. W. & H. Prentiss for plaintiff.

The substance of the charge is, that if the defendant was privy to a fraudulent conveyance from the Goodwins, yet this would not be sufficient to make him liable for the penalty; but that, if he aliened the premises, the burden of proof was on him, to show that he did so with no fraudulent intent; and that, in the absence of explanation from the defendant, it would be presumed that he aliened with intent to avoid the plaintiff's right, &c. It would not seem, that this charge can afford any just ground of complaint to the defendant. The statute against fraudulent conveyances seems to contemplate two things on the part of the grantee to exist, in order that he should properly be fixed with the penalty;—1, That he should be *privy* to a fraudulent conveyance,—and 2, That he should, being *privy* thereto, justify the same to have been made, had, or executed, *bona*

*The counsel also argued the point as to the admissibility of the evidence excluded by the county court; but as the question was not decided, that portion of the argument is omitted.

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fide, and upon good consideration, or should alien or assign such houses, lands, &c. The fact of aliening or assigning the premises seems to be equivalent to a justification, and to furnish an artificial rule of evidence, in the nature of an estoppel to the defendant. But it is not treated so by the court below, but more favorably to the defendant, inasmuch as the charge proceeds upon the ground of the right of the defendant to show that he aliened with an honest purpose.

The opinion of the court was delivered by

KELLOGG, J. Two exceptions were taken to the rulings of the court below, which have been argued by counsel in this court. The first, founded upon the decision of the court excluding the testimony offered by the defendant,—the second, upon the instructions given by the court to the jury. Upon the first question the court are not so fortunate as to be entirely agreed; and we therefore express no opinion upon that part of the case.

The court, in their charge to the jury, instructed them, "that, if the defendant had not a fraudulent intent in taking the deed, such as would subject him to the penalty claimed in the action, still, if the intent of the Goodwins in conveying to him was fraudulent, and he was aware of that intent, by conveying the same land to Julia Wheelock the burden of proof became shifted, and it was incumbent on the defendant to prove that he executed the deed to Julia Wheelock in good faith, and with no fraudulent purpose; and that, upon failure of such proof, he must be presumed to have conveyed away the land with intent to defraud the plaintiff." This instruction, we think, was erroneous. It proceeds upon the ground that the conveyance, by the defendant to Julia Wheelock, cast upon him the necessity of proving that the conveyance was made in good faith, and, upon failure of such proof, that the law raises a presumption, that he alienated the land to defraud the plaintiff, and thereby subjected himself to the penalty for taking a fraudulent conveyance. To this proposition we cannot accede.

In the first place, it is worthy of remark, that the gravamen of the plaintiff's complaint is, that the defendant fraudulently and corruptly received the *deed from the Goodwins*, to defraud the plaintiff; and the particular matter of the defendant's alienation of the land

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to Julia Wheelock was not within the issue, which was made by the parties. It is not even averred, that this alienation of the land to Julia Wheelock was made with intent to defraud anyone. This alienation, at most, would only be evidence, that the defendant justified the conveyance made to him by the Goodwins, in *the manner and for the purpose* for which it was made. Nor did this alienation of the land to Julia Wheelock tend to prove, that the same was done to defraud creditors; and we cannot perceive how any such legal presumption arises upon the conveyance, as seems to have been supposed by the county court. It did not, as we think, shift the burden of proof, and impose upon the defendant the necessity of showing that the conveyance was *bona fide*. But it is a sufficient answer to this part of the case, that it was not within the issue.

If, then, the plaintiff is entitled to recover in the present case, it must be upon the ground, that the deed from the Goodwins to the defendant was made and received with a fraudulent intent, which existed in both parties; and this intent must be found by the jury. *Brooks v. Clayes et al.*, 10 Vt. 37. If, in fact, the defendant took the conveyance from the Goodwins in *good faith* for the purpose of securing a debt due to him, he had a lawful right so to do, and he would not thereby subject himself to the penalty for a fraudulent conveyance; and, in the judgment of the court, the case should have been so put to the jury. The charge, we think, was clearly erroneous.

The judgment of the county court is reversed.

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TIMOTHY JOSLYN v. THOMAS TRACY.

Whenever new matter is introduced in any of the pleadings in a suit, the plea should conclude with a verification.

Where the defendant, in an action of trespass, justifies the taking of the property by virtue of a rate bill and warrant, and the plaintiff replies a tender of the amount of the tax and interest, a rejoinder, that the defendant was entitled to and claimed travelling fees, in addition to the tax and interest, and that therefore the tender was insufficient, should conclude with a verification.

If the collector of a tax, after having demanded of a person named in his rate bill the amount of his tax, perform travel for the purpose of distraining property for the payment of such tax, he is entitled to his fees for such travel; and a tender, after such travel is performed, of the amount of the tax and interest is insufficient, if the collector claims his travel fees.

A sheriff, holding an execution for collection, is not obliged to receive the amount of the execution and interest, though tendered to him by the debtor before any levy is made, unless his fees are also offered to him. KELLOGG, J.

TRESPASS for taking a horse. The defendant pleaded the general issue, and also, in bar, that he was collector of taxes in the town of Morristown, and, as such, held a rate bill and warrant requiring him to collect a tax from the plaintiff of ninety-nine cents, that he repeatedly called on the plaintiff for the tax, and notified him when and where he would receive it, that, particularly, on the fourth day of March, 1844, he demanded payment of the defendant, at Brownington,—which the plaintiff refused,—that on the 7th of September, 1844, he again demanded the tax, at Brownington, with the interest and fees, and that, upon the plaintiff's refusing to pay the same, he afterwards distrained and sold the horse in question,—which was the trespass complained of. The plaintiff replied, that immediately upon the first application of the defendant to the plaintiff for the payment of the tax, to wit, at Brownington, on the 31st day of August, 1844, and before the defendant had proceeded to distrain the horse in question, he tendered to the defendant the full amount of the tax and interest, being one dollar and twenty-five cents, and that the defendant refused to receive the same. The defendant rejoined, admitting that the tender was made and refused, as averred in the replication, but alleged, that, the plaintiff having neglected and refused to pay the tax at the time and place appointed by the defendant, and hav-

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ing repeatedly refused to pay the tax, the defendant, before the making of the tender, proceeded with his rate bill and warrant from Morristown to Brownington, where the plaintiff then resided, for the purpose of distraining the property of the plaintiff for the payment of the tax, that at the time the tender was made, he was at Brownington, and had called upon the plaintiff for the purpose of distraining his property for the payment of the tax, with the interest and costs, that he was then entitled to demand and receive of the plaintiff the sum of two dollars and four cents for his travel from Morristown to Brownington, and that therefore the tender was insufficient; and the rejoinder concluded with a verification. To this rejoinder the plaintiff demurred specially.

The county court, December Term, 1845.—*Royce, J.*, presiding,—decided, that the rejoinder was sufficient, and rendered judgment for the defendant. Exceptions by plaintiff.

J. L. Edwards and S. B. Colby for plaintiff.

1. The tender was sufficient. The defendant was not entitled to fees, until he had distrained. Rev. St. 476. A distress for taxes is in the nature of an execution. A sheriff's right to fees upon an execution accrues from a levy of the execution. *Barnard v. Stevens*, 2 Aik. 429. *Shattuck v. Woods*, 1 Pick. 170. A rate bill and warrant is not a returnable process; 5 Vt. 65; and it is difficult to see what mileage the defendant would be entitled to, other than for commitment; which, in this case, never accrued.

2. The rejoinder alleges matter inconsistent with the traversable allegations in the replication, and which forms no issue upon them, and should therefore traverse those allegations. The replication alleges, that immediately upon the first application of the defendant to the plaintiff for the payment of the tax, and before the defendant had proceeded to distrain, the plaintiff tendered to him the amount of the tax and interest. This is a material allegation, and is not denied by a common negative, nor is it traversed. It is evident, that, at this stage, the controversy was ready for an issue; and nothing could be gained by rejoining mere *repugnant affirmative* matter, which forms no issue. It is a well settled principle, that whenever any *material fact* is alleged in pleading, which, if denied, will, upon issue joined, decide the case, the adverse party, if he plead matter

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inconsistent with and contrary to such allegation, must traverse it. Gould's Pl. 303. The omission of a traverse, when necessary to form an issue, is bad on general demurrer. Story's Pl. 341. 5 Mass. 125. 2 Mod. 60. Hob. 233. Yelv. 122.

3. The rejoinder is argumentative, denying the replication by inference, merely.

L. P. Poland for defendant.

1. The defendant contends, that in every case, where a person, after notice, refuses to pay his tax, the collector is entitled to the same fees as a sheriff, or constable, with an execution. This view is strongly supported by the case of *Hunter v. Le Conte*, 6 Cow. 728. And see *Henry v. Tilson*, 17 Vt. 479; Rev. St. c. 107, § 8.

2. It is objected to the rejoinder, that it ought to have concluded to the country. It seems to be a universal rule, that when new matter is contained in any pleading, it should conclude with a verification, in order to give the other party an opportunity to answer it. 1 Chit. Pl. 557. The fact, that, before the plaintiff made his tender, the defendant had actually made cost, which ought also to have been paid, had not been alleged in any precedent pleading, unless argumentatively and by mere inference, and therefore must be treated as new matter. This rejoinder is very analogous to the common replication to a plea of tender,—the issuing of a writ, or a writ with continuance, before the tender,—which always concludes with a verification. 1 Chit. Pl. 579, 582. 2 Ib. 1152.

The opinion of the court was delivered by.

KELLOGG, J. Several questions have been presented for our consideration; but it will only be necessary to examine one, as that will dispose of the case.

It has been urged, that the rejoinder is insufficient, inasmuch as it concludes with a verification, when it is insisted it should have concluded to the country. This exception, we think, is not well taken. The rejoinder introduces *new matter*, showing that the defendant was *entitled to and claimed travelling fees* in addition to the tax, and that consequently the tender was insufficient. It is a well settled rule of pleading, that, whenever the pleader introduces new matter in any of the pleadings, the plea should conclude with a verification. The rejoinder is therefore, in this particular, well

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enough. Some other objections have been taken to the form of the rejoinder; but we do not think these formal exceptions can be sustained.

But the important question arising upon the rejoinder, and which is the principal matter of controversy between the parties, is, whether the defendant, under the circumstances set forth in the rejoinder, is entitled to travelling fees. If he was not entitled to charge and claim such fees of the plaintiff, then the rejoinder is no sufficient answer to the replication.

It is urged, that the law allows the collectors of taxes to tax the same fees as sheriffs for levying executions; and it is insisted, that the right of sheriffs to charge fees upon executions arises upon the levy of the same, and that only, and that, as no distress was made by the defendant, he was not entitled to fees; and the case of *Barnard v. Stevens*, 2 Aik. 429, is relied upon, to support this position. That case only decides, "that if the amount of an execution be paid and satisfied to the party, and he endorse the same on the execution, after it is in the hands of the officer, but before he has made any levy thereof, the officer is not entitled to fees thereon." But suppose the amount of the execution had been paid or tendered to the officer, holding the execution, and before any levy was made, will it be pretended that he is not entitled to his fees? Is he bound to receive the money, and without any compensation? We know of no authority to sustain such a doctrine. The sheriff, in such a case, is unquestionably entitled to charge his fees to the execution debtor.

So in the case at bar, if the defendant had travelled from Morristown to Brownington for the purpose of making a distress for the non-payment of the plaintiff's tax, he having previously repeatedly called upon the plaintiff to pay the same, which he refused to do, as is alleged in the rejoinder, we entertain no doubt he was entitled to exact of the plaintiff his travelling fee, in addition to the tax. The plaintiff could not, after the defendant had performed the travel and was about to make the distress, by tendering the amount of the tax defeat the defendant's right to his fees. And inasmuch as the tax and the defendant's travel fee amounted to more than the sum tendered by the plaintiff, the tender was insufficient, and the rejoinder was sufficient. As this disposes of the case, it will be unnecessary to consider the remaining questions in the case.

The judgment of the county court is affirmed.

Drew v. Chamberlin et al.

JOHN DREW v. SPENCER CHAMBERLIN AND CHARLES A. CLARK.

Upon a *scire facias* on a recognizance, taken upon an appeal from a judgment of a justice of the peace upon a complaint for wilfully and without force holding over demised premises, founded upon the sixth section of the statute of February 27, 1797, and conditioned that the appellant should pay to the complainant all intervening damages, occasioned by his being delayed, with additional costs, in case the judgment should be affirmed, the plaintiff is not entitled to recover, as intervening damages, the value of the rents and profits of the premises from the time the appeal was taken until the time judgment was affirmed and a writ of restitution obtained.

Where the declaration, in such case, alleged that the plaintiff had been deprived of the rents and profits of the premises in consequence of the appeal, and that these constituted intervening damages which he was entitled to recover, and also that additional costs were incurred, and the defendant, in his plea, averred that he had paid all the costs, and that no other intervening damages had accrued, except the enhanced costs, and that the amount of the costs was accepted by the plaintiff in full satisfaction and discharge of all damages, and the plaintiff, in his replication, traversed all these averments, except the payment of the costs, it was held, that the real issue involved was, whether, in addition to the costs, any damages to the plaintiff intervened between the appeal and the final judgment, and that, under this issue, the plaintiff was not entitled to prove the value of the rents and profits of the premises during that time.

Evidence adapted to prove the material and substantial part of the issue formed by the pleadings is admissible, although the pleading, on the part of the party offering the evidence, may be so defective, that judgment would be arrested after a verdict; but this does not entitle the party to prove every immaterial circumstance, that may happen to be embraced by the issue,

SCIRE FACIAS upon a recognizance, taken upon an appeal by the defendant Chamberlin from the judgment of a justice of the peace, upon a complaint for wilfully and without force holding over certain demised premises, founded upon the sixth section of the statute of February 27, 1797, and conditioned, that the appellant should pay to the complainant all intervening damages occasioned by his being delayed, with additional costs. And the plaintiff alleged, in his replication, that he had been kept out of the possession of the premises, in consequence of the appeal, from the time the appeal was taken until final judgment was rendered in his favor, and that the rents and profits of the premises, during that time, amounted to thirty-six

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dollars, which he had lost, and which constituted intervening damages, and that additional costs had also been incurred, which had not been paid. The defendant pleaded two several pleas in bar, the substance of which was, that the costs recovered by the plaintiff amounted, in all, to \$19.54, that no other intervening damages had accrued, that the rents and profits of the premises amounted to no other or larger sum, that he had paid the amount of the costs in full, and that the plaintiff accepted that amount in full satisfaction and discharge of all damages. The plaintiff replied, traversing all these allegations in the pleas, except the payment of the costs. Trial by jury, June Term, 1846,—ROYCE, J., presiding.

On trial the defendant gave in evidence the writ of restitution, with the plaintiff's receipt upon it, showing the payment of the costs and that possession of the premises had been delivered to him. The plaintiff offered evidence to prove the value of the use and occupation, rents and profits, of the premises, from the time the appeal was taken until the time when the plaintiff finally obtained restitution and possession of the premises. To this evidence the defendant objected; and it was excluded by the court.

The court directed a verdict for the defendants. Exceptions by plaintiff.

J. Cooper for plaintiff.

If the evidence offered by the plaintiff tended to prove the issue formed, it was admissible. The allegation in the declaration is, that the rents and profits from the appeal to the restitution were intervening damages. The plea is, that \$19.54 was all the costs and intervening damages, and that the rents and profits were no other or larger sum. These facts are traversed. The evidence tended directly to prove the issue on the part of the plaintiff. Evidence tending to prove the issue is admissible, though the declaration be defective. *Harding v. Cragie*, 8 Vt. 501. *Onion v. Fullerton*, 17 Vt. 359. *Barney v. Bliss*, 2 Aik. 60. *v. French Thompson*, 6 Vt. 54, 59. *Warden v. Burnham*, 8 Vt. 390.

What are intervening damages? Ordinarily they refer to the debt, claim, or thing to be recovered, and are said to be what the plaintiff has lost by the delay. This action was not to try a right of property, nor could that come in question,—but simply whether the plaintiff

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had the right of possession. If there are intervening damages, they must be something relating to the use of the premises; for this is sought to be recovered, that is, the occupancy; and the possession is all there is in issue, or can be. The delay in obtaining this is the plaintiff's loss in consequence of the appeal, and constitutes the intervening damages. The plaintiff is entitled to recover the value of his chance of obtaining the thing sued for, when delayed by an appeal. 1 Aik. 296. 17 Vt. 562.

J. H. Kimball for defendants.

We think the use and occupation, rents and profits, of the land in controversy in the original suit are not intervening damages. 1. The suit against Chamberlin could only be for the restitution of the land sued for; Slade's St. 187, § 6; therefore no judgment could be or was rendered, in that suit, for debt, or damages. 2. If the plaintiff claimed damages, his remedy was by a distinct and separate action, founded upon the eighth section of the same statute,—Slade's St. 188, § 8,—or upon section eighteen of chapter forty-one of the Revised statutes. 6 Vt. 286. 3. The plaintiff's suit was for the restitution of the land only; and the recognizance only bound the defendants for the additional costs and for such debt, or damages, as the plaintiff was entitled to recover in that suit; and as the plaintiff could only recover restitution of the premises in that suit, and no damages, the recognizance was only for costs. It was like a case, where the plaintiff appeals,—when the judgment is only for costs.

The opinion of the court was delivered by

DAVIS, J. The original proceeding, on the appeal of which to the county court the recognizance now sued was taken, was a complaint in writing, made by the plaintiff against Chamberlin, one of the defendants, founded upon the sixth section of the statute of February 27, 1797,—Slade's St. 187, § 6,—in relation to forcible entry and detainer, for wilfully, but without force, holding over two small pieces of land in Glover after the determination of the demise to Chamberlin. It was made to a single justice, *Dwinnell*, in pursuance of the additional statute of November 17, 1836; and a hearing was had before said justice and a jury of six, on the 19th day of June, 1840. A verdict having been returned in favor of the plain-

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tiff, judgment was thereupon rendered, that the plaintiff have restitution of the premises described in his complaint, and that he recover his costs. An appeal being taken by Chamberlin, he as principal, and Clark, as surety, entered into the recognizance in question. It was in conformity to the statute requirement, and contained a stipulation against intervening damages, as well as additional costs. The case was entered in the county court; and at the December Term, 1840, judgment was finally rendered for the plaintiff, for restitution of the lands mentioned, and for costs, including additional costs. A writ of possession and execution for costs was issued, by virtue of which the plaintiff was put in possession of the lands. He also received the full amount of costs taxed, and receipted the same on the back of the execution.

The plaintiff in his declaration alleges, that he was kept out of the possession of the premises, and from the receipt of the rents and profits of the same, about nine and a half months, in consequence of the appeal,—the value of which he states was thirty-six dollars; and he claims to recover that sum in this suit, as intervening damages. The defendants have pleaded two special pleas in bar, which are substantially alike,—setting forth, in detail, the facts above stated in respect to the proceedings in the suit, the recovery of final judgment, in the county court, for restitution and costs, the payment of the latter, and averring that said amount of costs was all the intervening damages sustained, that that sum, being \$19.54, was received and accepted by the plaintiff in full satisfaction and payment of all intervening damages and costs, that the rents and profits were no other and larger sum, &c. The plaintiff, in his replication, traversed so much of these pleas as related to intervening damages and the acceptance of the amount of costs in full satisfaction of all costs and intervening damages. Issue was closed to the country.

On trial in the county court, in support of the issue on his part, the plaintiff offered proof of the value of the premises from the time of taking the appeal to the time when he obtained restitution and actual possession. This evidence was rejected by the court,—and we think on correct grounds.

Nothing in the statute indicates an intention in the legislature to comprehend the accruing rents and profits, during the pendency of the appealed cause, as intervening damages. On the contrary, the

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statute, in express terms, after the defendant shall be found guilty, gives to the plaintiff a right to recover, in an action of trespass, single or treble damages, depending upon the fact, whether notice to quit had or had not been given. In analogy to the proceedings in ejectment in England, no provision is made for the recovery, in the direct proceeding, of rents and profits in the form of damages,—nothing but the land itself, and the costs of suit. If, then, in no event, damages can be comprehended in the original judgment, it would be strange logic to maintain that such a result may be reached by a proceeding merely incidental and collateral to the main suit. The statute having pointed out a mode in which they may be recovered, we are satisfied no other exists.

But it has been urged by the plaintiff's counsel, that though all this be so, yet, under the issue formed by the pleadings in this case, the proof offered was pertinent and proper, and tended to sustain the issue on his part, and ought therefore to have been received. There is no doubt of the general soundness of the proposition contended for, when properly applied and understood. It is very liable to misconstruction, however. It is never understood in such a sense, as to require, that every immaterial circumstance, that may happen to be embraced by the issue, shall be open to proof. Evidence adapted to prove the material and substantial part of the issue is of course admissible, although the written statement of his case, by the party offering it, whether in a declaration, or plea, may be radically defective,—so much so, even, that judgment would be arrested after a verdict. This is the sum and substance of the doctrine laid down by the judges of this court, in the several cases to which we have been referred.

In this case it is not to be disguised, that the pleas in bar are very inartificially drawn, asserting matters, which, whether true, or false, have nothing to do with the merits of the controversy. The defendants could not safely have demurred to the declaration, inasmuch as that averred, that additional costs were incurred in consequence of the appeal,—an event prospectively provided for by the terms of the recognizance; but it nowhere contains an admission of the payment of such costs. This fact, therefore, it was necessary for the defendants to bring forward, in order to shield themselves; and it was, in truth, the only essential fact, which it was necessary

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thus to bring forward. Whatever was said in the declaration in respect to the plaintiff's being kept out of the rents and profits a certain length of time, and that these constituted intervening damages, for which he had a right to recover, needed no answer. The replication, therefore, admitting, as it does, by implication, the fact of payment of these costs, has admitted all that was essential to the defence; and had it been demurred to, it must have been adjudged insufficient. The issue having been, however, closed to the country, the inquiry arises, what were the elements of that issue? Undoubtedly the real point involved was, whether, in addition to the costs, any damages to the plaintiff intervened between the appeal and final judgment. The declaration asserts the affirmative; the pleas, besides averring payment in full of all costs recovered, proceed to deny, that any intervening damages occurred, other than the enhanced costs, and conclude by stating the acceptance of the amount of costs in full satisfaction and discharge of all damages. These averments in the pleas, except those relating to the payment of costs, are traversed in the replication. The issue thus formed included matter of law, as well as matter of fact.

It seems by the record, that the only evidence, offered by the plaintiff in support of the issue, related to the value of the use and occupation, rents and profits of the premises, during the interval. This fact, alone, had no tendency to prove, that the plaintiff had sustained damage, unless we assume, as matter of law, that the loss of these rents and profits for a season constituted intervening damages, within the true intent and meaning of the recognizance. Such assumption could not be properly made. The acceptance or non-acceptance, formally put in issue, was a matter immaterial in itself; and besides, it was not incumbent on the plaintiff, had it been otherwise, to take the initiative in respect to it; and he did not, in fact, offer any evidence on that point. We think, therefore, the ruling of the county court was right; and their judgment must be affirmed.

Kimball, Ex'r, v. Kimball.

**JOHN H. KIMBALL, Executor of JOHN KIMBALL, v. FREDERICK
W. KIMBALL.**

Where a proceeding is commenced by an executor, in pursuance of the provisions of section seven of chapter forty eight of the Revised Statutes, for the purpose of compelling the defendant to make a discovery, under oath, as to property of the estate in his hands, the case must be finished in the probate court, before an appeal can be taken from that court to the county court. An appeal from an order, made by the probate court in such case, that the defendant answer certain interrogatories propounded to him, is premature, and will be dismissed, on motion.

In this case, the trial having proceeded in the county court upon the propriety of the interrogatories, and the question as to the regularity of the appeal not having been raised in that court, but the appeal having been dismissed in the supreme court, no costs in the county court were allowed to either party; and as to the costs in the supreme court, the parties were left to their legal rights.

APPEAL from the court of probate. The case is sufficiently stated in the opinion of the court.

T. P. Redfield for complainant.

J. Cooper for defendant.

The opinion of the court was delivered by

REDFIELD, J. This was an application to the probate court to cite in the defendant to make a discovery, under oath, in regard to certain property of the deceased, or what was, by the executor, claimed to be the property of the deceased. The defendant declined answering certain interrogatories propounded to him, and which the probate court decided he was bound to answer; and from this decision he claimed and was allowed an appeal to the county court. In the county court the hearing proceeded, by general consent, upon the question as to the propriety of the interrogatories,—that court deciding upon the fitness of those interrogatories, allowing some and disallowing others, and remanding the case to the probate court, with instructions to them to proceed accordingly; to which decision the plaintiff excepts, and the case has come into this court.

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Upon examination, we are clearly of opinion, that the case came prematurely into the county court, and that the appeal should not have been entertained by that court, but *dismissed*. The statute seems to contemplate, that, when a case like the present comes before the probate court, it will be *finished* in that court, in the first instance certainly, like all other cases. The strange incongruity, too, of the proceedings attempted in the present case, shows, as much as any thing could, the necessity of such a practice, as the statute seems to contemplate. If the *principle* of an appeal in the present case is sound, then it must apply to all cases, and in all forms; and if the appeal may be taken from sixteen interrogatories, then, with equal propriety, it may be taken from each separate interrogatory. And, as often as the case is remanded to the probate court, that court may, in its discretion, allow other interrogatories, and other appeals may be allowed, so long as the ingenuity of man can devise new questions, *in infinitum*. It needs no argument, to show that such a practice would become absolutely intolerable.

We must, therefore, reverse the judgment of the county court, and proceed to render such a judgment, as they should have rendered,—which is, that the appeal be dismissed. No costs are allowed, in the county court, to either party, as the question, upon which the case is here decided, was not raised in that court. We make no order in regard to costs in this court; but leave the parties to their *legal rights*.

The proceedings in the present case were instituted under the seventh or seventh and eighth sections of chapter forty eight of the Revised Statutes. In both of these sections the statute expressly provides, that, if the defendant shall refuse to disclose, or render an account, according to the order of the probate court, he may be committed by that court; and we understand the statute, as peremptorily prescribing the manner of proceeding, and that "*may*" therefore does virtually mean "*shall*." Whether, after the case is finished in the probate court, an appeal would be of any avail to the party is not necessary now to be considered.

Judgment of the county court reversed. Judgment, that the appeal be dismissed.

Paddock v. Palmer et al.

WILLIAM E. PADDOCK v. JAMES PALMER, LEBBEUS H. CHASE,
FRANCIS B. HALL, BENJAMIN HALL, WILLIAM F. DICKINSON
AND THOMAS JAMESON.

[IN CHANCERY.]

Where property, attached upon a writ, is bailed to a receiptor, a judgment, recovered by the creditor against the receiptor, upon the receipt, becomes a mere dead letter upon the payment of the debt to the creditor. Such judgment is merely collateral to the debt, and is for the benefit and security of the sheriff, and ceases to have force when his liability to the debtor and creditor is discharged.

Where creditors, after the debt has been paid to them, seek to enforce a judgment against the receiptor of the property attached in the suit brought for the collection of the debt, a court of equity, to prevent circuity of action, will interfere and enjoin the suit.

The judgment against the receiptor, in such case, being merely collateral to the debt, is in the nature of a penalty; and if payments were made towards the debt, prior to the recovery of the judgment against the receiptor, and not allowed for in making up that judgment, a court of equity will interfere and restrict the creditor to the collection of the actually due.

Where it is obvious, in such case, that the creditors, after having obtained judgment against the receiptor for the full amount of the debt, making no allowance for payments which had been actually made to them previously, received from the receiptor the balance actually due to them upon the debt, and, by words and actions, gave him to understand that they considered the judgment against him paid, with a mere view of keeping him along until his remedy by petition for a new trial should be gone by lapse of time and then pursuing him for the balance appearing due upon the judgment against him, there can be little doubt, that a court of equity may enjoin the judgment upon the *mere ground of fraud*.

APPEAL from the court of chancery. The orator alleged in his bill, that on the sixteenth day of March, 1836, the defendants James Palmer, Lebbeus H. Chase, Francis B. Hall, Benjamin Hall and William F. Dickinson, doing business under the firm of Palmer, Chase & Co., prayed out a writ of attachment in their favor against one Jonathan Houghton, demanding in damages the sum of six hun-

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dred dollars, and delivered the same to the defendant Thomas Jameson, sheriff, for service; that Jameson attached thereon certain property, and took the receipt of the orator and Houghton therefor; that at the April Term, 1837, of Washington county court, Palmer, Chase & Co. recovered judgment in that suit against Houghton for \$321,59 damages, and \$82,41 costs, and took execution therefor; that the property was demanded of the receiptors, and not delivered, and in 1838 Palmer, Chase & Co. commenced a suit against the orator, in the name of Jameson, upon the receipt; that at the June Term, 1840, of Orleans county court judgment was recovered in that suit against the defendant for \$477,00 damages, and 43,13 costs; that the orator, on the 13th day of December, 1837, being satisfied that he should eventually be compelled to pay the debt, and having in his hands some funds belonging to Houghton, paid to Palmer \$100,00, for which Palmer gave a receipt in the name of Palmer, Chase & Co., thereby promising to apply the same upon the execution in their favor against Houghton; that on the 12th day of March, 1838, the orator paid to Palmer the farther sum of \$100,00, for which Palmer executed a like receipt; that at the time the judgment was recovered against the orator in the suit in the name of Jameson, the orator was assured by Palmer, Chase & Co., that all they sought to recover of him was the amount of their judgment against Houghton, after deducting the payments made as above mentioned, and that those payments were endorsed upon the execution against Houghton, and that an execution should issue against the orator for the balance only; that they in fact prayed out their execution for the full amount of the judgment, and delivered the same to one Locke, a deputy sheriff, to collect; that the orator, believing this was an unintentional mistake, called the attention of Palmer, Chase & Co. to it, and they then declared, and informed Locke, that the whole amount due on said execution was but \$304,-52, and directed Locke to receive that amount in satisfaction of the execution; that on the fifth day of October, 1840, the orator paid that sum to Locke and Locke paid the same to Palmer, Chase & Co., and they received back the execution and delivered to Locke his receipt therefor; that all this was done by Palmer, Chase & Co. for the purpose of inducing the orator to believe that that execution was fully settled, until the time, within which the orator might ob-

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tain redress by motion, or petition for a new trial, had elapsed, and then compel him to pay the balance of the judgment; that Palmer, Chase & Co. afterwards prayed out a writ of *scire facias*, returnable to the June Term, 1844, of Orleans county court, to revive the judgment in the name of Jameson against him; and that that suit was still pending in court. And the orator prayed, that the defendants might be enjoined from prosecuting that suit, and from making any use of the judgment in the name of Jameson against the orator, and for general relief.

The defendant Palmer answered, admitting the facts alleged in the bill as to the suit in favor of Palmer, Chase & Co. against Houghton, and the commencement, at their instance, of the suit in the name of Jameson against the orator upon the receipt; but he denied, that there was any agreement, or assurance, that any allowance should be made, in that suit, for any payments previously made upon the execution against Houghton, and averred that the suit was contested, and that the damages were ascertained and fixed, by the verdict of the jury, at \$477,00; and he claimed, that this verdict and the judgment thereon were final and conclusive upon the orator, and all other persons, and declined answering as to any payments made previous to that time. This defendant also denied the allegations in the bill as to the directions to Locke,—but admitted the receipt of the sum of \$304,52, claimed to have been paid by the orator to Locke.*

The answer was traversed, and testimony was taken. The orator proved the execution by Palmer, for Palmer, Chase & Co., of the two receipts, for \$100,00 each, described in his bill, and also proved that he had paid to Locke, October 5, 1840, the balance due upon the execution against him, after deducting those two payments, and that Locke paid to the attorney of Palmer, Chase & Co. that sum, and at the same time returned to him the execution.

The court of chancery decreed in accordance with the prayer of the bill; and from this decree the defendants appealed.

*The papers furnished to the reporter do not show, whether the other defendants answered, or whether the bill was taken as confessed as to them, not the particular terms of the decree made by the court of chancery.

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T. P. Redfield and *S. B. Colby* for orator.

The orator insists, that, being a mere receiptor, a collateral guarantor, his liability is at an end, when the judgment against Houghton is paid, or discharged. It would seem clear, that the defendants could not pursue Houghton, for the reason that they have received their pay by \$200.00 collected upon the execution against Houghton, and \$304.52 collected of the receiptor; yet the defendants insist upon this absurdity, that, after the principal has paid the debt, they may pursue his *guarantor* for the *same debt*. It is true, that the defendants are permitted to pursue the principal and his collateral security, at the same time, and may have two judgments; but they can have *but one satisfaction*. *Stillman v. Barney*, 4 Vt. 331. *Bank of Rutland v. Thrall*, 6 Vt. 237.

But the defendants contend, that, inasmuch as a portion of the debt had been *paid*, and the execution against Houghton reduced *pro tanto*, the receiptor, when sued, should have pleaded this fact. But we think he was not bound to do so. The orator was not party, nor privy, to the suit against Houghton, and was not legally bound to know what payments had been made upon the execution obtained in that suit, and of course could not be required to plead them.

But we insist, that, upon the ground of *fraud*, the court should enjoin this judgment. It was fraudulent, as against the receiptor, to neglect to apply the payments upon the execution against Houghton, as, by their receipts, the defendants had agreed to do. It was fraudulent in them to deduct the amount of the two receipts from the execution and take back the execution, upon receiving the payment of \$304.52, giving the orator to understand that the execution was paid, if at that time they intended ever to revive that judgment. They thus induced him to believe, that the execution was cancelled, until all remedy by motion, or petition for new trial, had become barred by the lapse of time. *Livingston v. Hubbs*, 2 Johns. Ch. R. 512. *Rigal v. Wood et al.*, 1 Ib. 402. *Lansing v. Eddy*, 1 Ib. 51. *Lyon v. Tallmadge*, 14 Johns. 511.

C. W. Prentiss for defendants.

This bill is for a new trial, in chancery, of a suit at law, where the defendant at law, had a perfect defence at law as he alleges, and neglected to avail himself of it. The following authorities, among

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others, show that the bill cannot be sustained. 15 Vt. 78. 13 Vt. 477. 18 Johns. 515. 2 Vt. 161. 2 Story's Eq. 174. Hard. 173. 1 Bibb 173. Cooke 36, 175. 3 Dessau. 323. 4 Ib. 422. 1 E. C. L. 534. 2 H & Mumf. 453. 1. Johns. Cas. 436. 6 Ham. 82. 1 Johns. Ch. R. 49, 91, 320. 6 Ib. 87. 4 Johns. 510. 14 Ib. 63. 12 Ib. 183. 8 Vin. 542. *Pettes et al. v. Bank of Whitehall*, 17 Vt. 435.

The opinion of the court was delivered by

REDFIELD, J. This is a case, which is certainly very peculiar in its facts and circumstances, but not, we think, involving any difficulty in its principles. That creditors should seriously insist upon collecting two hundred dollars from the receipt man, in the name of the sheriff, *after the original debt is confessedly paid*, is a case, which it is believed will not often occur. It is one, which needs only to be stated, to have its injustice, severity and cruelty felt by all, whose hearts are not wholly callous to every generous sentiment, and equally indifferent to all the distinctions between right and wrong, except so far as these distinctions are recognized and enforced by the municipal law.

But when it is considered, that the judgment against the receipt man was merely *collateral* to the debt, that it was for the benefit and security of the sheriff merely, and that, when his obligation to the creditor was gone, that was gone too, (unless the debtor had claims upon him,—which is not claimed here,) this judgment against this orator becomes a mere dead letter by the payment of the debt to the creditors. That is confessedly paid; and this may be shown in any suit by the creditors, whether against the debtor, or his personal representative, or the sheriff; for none of them are any way affected by this judgment between the sheriff and the receipt man.

1. If the sheriff should collect the money upon this judgment, the creditors could not compel him to pay it to them. For in order to do that, they must show, that some portion of their debt still subsists. Neither could the sheriff justify himself in paying it to the creditors; but he must pay it to Houghton, or his representatives, who are liable to indemnify this plaintiff. Thus the very money, sought to be recovered of this plaintiff upon this judgment, must ultimately go back into his hands again. And to prevent circuity of action, equity will interfere and enjoin the suit.

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2. The judgment against the receipt man, being merely collateral, is in the nature of a penalty; and equity will, in all cases of a penalty, interfere to restrict the party to the recovery of a penalty to the sum actually due. This was the only remedy, before the statutes giving courts of law the right to exercise chancery powers in cases of suits upon penal bonds. This was the ground of the great controversy between courts of law and equity, in regard to the independence of their several jurisdictions of each other, so long ago as the time when Sir Thomas More held the office of Lord High Chancellor. Of him it is said, that, when the judges of the common law courts complained of his interfering in the enforcement of their judgments for the penalty of bonds, he suggested, that they should only render judgment for the sum *actually due*, which they declined acceding to; that the chancellor then swore an oath, in the horrid language of the times, by the beard of the Almighty, that *just so long* as the courts of law continued to render such judgments, *he would enjoin them*.

3. When we look at the monstrous injustice of the claim put forth in the defence to this bill, and the ground upon which it is put, *that the court of chancery can give no relief, if they would*, and consider the proof in the case, which tends very conclusively to show, that, *with the creditors*, it has been matter of *deliberate purpose to keep the orator along*, with declarations that they considered the debt paid, or intimations from their conduct, which they must have known he would so interpret, until his *remedy by petition for new trial was gone* by lapse of time, and then pursue the judgment against the plaintiff,—in view of these facts there can be little doubt a court of equity *might enjoin* the judgment upon the *mere ground of fraud*. And, if it could be done, one would hardly hesitate reverently to adopt the *sentiment* of Chancellor More, in how much soever milder forms of speech he would choose to express himself. Such outrageous attempts at oppression and injustice cannot fail to produce corresponding sentiments of indignation in all honest hearts. And if the chancellor of this district never makes any less just decrees, than the one in the present case, he will never find my voice, while I hold a seat in this court, in favor of reversing them.

Decree of the chancellor affirmed, with additional costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE.

MAY TERM, 1847.

PRESENT.

Hon. ISAAC F. REDFIELD,
Hon. DANIEL KELLOGG,
Hon. HILAND HALL,
Hon. CHARLES DAVIS,
ASSISTANT JUDGES.

PAUL T. SWEET v. JOHN HARDING.

A tender, made in the absence of the party, to whom, by the terms of the contract, it is required to be made, must be made before the evening of the day on which the contract falls due. And there is no difference, in this respect, between a tender of money and specific articles.

A tender of rent, on the day on which the same falls due, made to the lessor, at a late hour in the evening, is a valid tender. *Thomas v. Hayden et al.*, Windsor Co., July Term, 1846, cited by KELLOGG, J.

ASSUMPSIT upon a promissory note, dated March 8, 1844, for \$25,55, payable to the plaintiff, or bearer, in good, saleable neat cattle, over one year old and not over eight years old, the fifth day of October, or in good clean grain in January following, to be delivered at the defendant's dwelling house. The defendant pleaded, that on the 31st day of January, 1845, he tendered good clean grain,

Sweet v. Harding.

to the amount of the note, at his dwelling house. Trial by the court, December Term, 1845,—ROYCE, J., presiding.

On trial the plaintiff produced the note described in his declaration,—the execution of which was admitted. The defendant then proved, that on the thirty first day of January, 1845, he procured a sufficient quantity of good clean grain to pay the note, and brought the same to the dwelling house then occupied by him in Lowell, and there, after dark, in the fore part of the evening, tendered and set apart the grain in payment of the note. This was done by candle light, and the plaintiff was not present; and the same grain was kept by the defendant at his dwelling house from that time to the time of trial, ready for the plaintiff.

Evidence was also given in reference to the question whether the tender was made at the proper place; but as this question was not decided, the evidence need not be detailed.

The plaintiff insisted, that the tender was made too late in the day, and that it should have been made by day light—but the court decided, that the tender was made at a proper time, and rendered judgment in favor of the defendant. Exceptions by plaintiff.

Wires and White for plaintiff.

Poland for defendant.

The opinion of the court was delivered by

KELLOGG, J. Upon the hearing in this court two questions have been presented for consideration.

1. The plaintiff insists, that the tender was not made in time, and consequently that the same cannot be sustained. We are aware, that the opinion has prevailed to some extent, that, in order to make a legal tender of either money, or specific articles, it must be made, not only on the day specified in the contract, but, in the language of some of the old authorities, at the uttermost convenient time of the day, and before the sitting of the sun, or at least before dark; and authorities are often cited to sustain that position. Indeed, in the case at bar, a *dictum* from Swift's Digest has been cited to that effect. But it is believed, that those authorities, when examined, will be found to apply to those cases, only, where the tender is made in the absence

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of the party, to whom, by the terms of the contract, the tender is required to be made. To such cases these authorities are applicable and are unquestionably good law. But it was held by this court, in the case of *Thomas v. Hayden*, Windsor Co., July T. 1846, that a tender of rent on the day on which the same fell due, made to the lessor, at a late hour in the evening, was a valid tender. Nor is there any difference, in that respect, between a tender of money and specific articles. *Startup v. Macdonald*, 46 E. C. L. 593. To this extent we understand the authorities to go; and we are not aware that they go any farther.

In the case at bar, the plaintiff, the payee of the note, *did not attend* on the day and at the place specified in the contract for the performance of the same. If, then, the defendant, *in the absence of the plaintiff*, would have discharged himself from the contract by a legal tender, he should have made the same before the *evening* of the day, on which the contract fell due. The tender not having been so made, the same was invalid; and for this cause the judgment of the county court must be reversed.

2. A farther question has been made and discussed, in relation to *the place where* the tender was made; but inasmuch as the case is disposed of by the previous question, it is unnecessary to express any opinion upon this.



Orrin Perkins v. Horace Dana and Elihu Hyde.

Where certain territory had been, for the space of thirty years, understood to be part of the jail limits of a county, and had been acquiesced in as such, by all concerned during that time, it was held, that it must be treated as in fact part of the jail limits, and that a prisoner's going thereon would be no breach of his bond,—as decided in *Downer et al. v. Dana et al. ante.*, page 338.

A new trial will not be granted on petition of the plaintiff, in an action upon a jail bond, unless he failed in his former trial through some fraud of the defendant.

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In this case, which was an action upon a jail bond, the plaintiff, on trial, gave evidence to prove ten distinct breaches of the bond, all committed in open day light, and in the most public manner ; but he failed, upon this evidence, to obtain a verdict ; and the supreme court refused to grant him a new trial, upon a petition setting forth, that, since the former trial, he had discovered evidence of two other breaches, committed in similar manner.

DEBT upon a jail bond. Plea, *non est factum*, with notice of special matter of defence, and trial by jury, December Term, 1845.—
ROYCE, J., presiding.

On trial a question arose as to the true limits of the liberties of the jail in Orange county,—the facts being the same as reported in the case of *Downer et al. v. Dana et al.*, ante, page 338, where the same question arose. The county court gave the jury the same instructions, in substance, as in that case.

Verdict for defendants. Exceptions by plaintiff.

After the suit had been entered in the supreme court, the plaintiff preferred to that court, a petition for a new trial, setting forth that the jail bond in suit was the property of one Solomon Downer, that this action was commenced by Downer, for his own benefit, in the name of this plaintiff, and that, since the trial in the county court, Downer had discovered new and material evidence. The substance of this evidence is sufficiently detailed in the opinion of the court.

A hearing was had upon the petition for a new trial at the same time with the trial of the case upon the exceptions.

Poland and Smalley for plaintiff,

— for defendants.

The opinion of the court was delivered by

REDFIELD, J. The question raised in the present case, upon the exceptions, was virtually decided by this court, upon the present circuit, in the county of Windsor.* It was there held, that, if jail limits *de facto* existed for such a length of time, as is shown in the

* *Downer et al. v. Dana et al.*, ante, page 338.

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present case, it did raise an irrefragable presumption, against all the world, that they existed *de jure*. Any other construction would do violence to reason and to justice. The bond is taken with reference to the *existing jail limits*. The jail limits are a *matter of fact*, a *definite object*, as much as a farm, or a stream of water. When once set out by the proper authority, they have a legal existence, *as set out*, as much as any judgment of this, or any other court; and the validity of the one, or the other, does not, in any sense, depend upon the perfect wisdom, or strict legal correctness, in every point, of the decision, but upon the fact, that it is the decision of the proper tribunal.

Judgment affirmed.

The petition for a new trial certainly presents a somewhat singular case. Upon the trial in the county court the plaintiff gave evidence tending to prove ten distinct breaches of the bond between the 12th of April, 1839, and the 2d of April, 1843, all, except one of them, committed in *open day light*, and in the most *public manner*. He now asks for a new trial, that he may introduce testimony tending to establish *two other breaches* of the bond. This newly discovered evidence is not technically *cumulative*. But in a matter like this, addressed to our discretion, we naturally ask ourselves, how the plaintiff can expect to succeed with testimony of *twelve such breaches*, when it is obvious, that he failed in convincing the jury of the truth of *any one of the ten*, mainly in consequence of the *multiplicity of evidence*, which he adduced to so many separate and distinct breaches. In a matter of this kind, which, if done at all, would be likely to be done covertly, the very *excess* of testimony induces a suspicion of its *genuineness*; so that the newly discovered evidence *lessens*, instead of increasing, the probability of the plaintiff's being able to convince a jury of its not being in some manner *mistaken*, or *misapplied*. If *genuine coin*, of a particular description, is known to be *scarce*, or if a particular person is not supposed to have the means of possessing much money, the finding, in the one case, a large quantity of the specified coin, and the finding, in the other, much money in the possession of the particular person, does induce a suspicion of its *genuineness*.

In the present case, I think that the very fact, that the plaintiff was able to give evidence of *ten distinct breaches*, and nine of them

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in *so open and notorious a manner*, could not but raise some apprehension, that there *must* be some mistake in the matter, somewhere. This apprehension is not at all *diminished* by the newly discovered evidence.

We think, also, that for another reason the new trial in the present case should be denied. Because the court should never grant a new trial, *in favor of the plaintiff, in a suit upon a jail bond*, unless he failed in his former trial through some fraud of the defendant,—which is not here pretended. This class of actions certainly operates with great severity upon bail, and ought not to be favored. There are few states, where a momentary departure from the limits of the jail yard implicates the bail in an absolute liability for the *whole debt*. And if it were now of any importance, I think such a law would not long remain in this state. We think, at all events, that a plaintiff could very seldom be entitled to a new trial in a case upon jail bond.

Petition dismissed, with costs.

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ELIJAH R. GREEN v. JOEL SHURTLIFF and JAMES BELL.

The statute, allowing a defendant, after a suit has been commenced, and until three days before the sitting of the court to which the writ is made returnable, to tender to the plaintiff the amount of his demand and the costs to that time,—Rev. St., c. 106, § 6,—was not intended to extend the right of making a tender to other actions, than those in which a tender might be made at common law; but the object of it was, to allow a tender after action brought,—which, without the statute, could not be made.

At common law a tender may be made in all cases, where the demand is in the nature of a debt, when the sum due is either certain, or capable of being made certain by mere computation; but it is not allowed, when the action is for unliquidated damages, the amount of which is to be determined by the exercise of discretion by a jury.

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In scire facias upon a recognizance entered into for the prosecution of an appeal, a claim for additional costs depends upon mere matter of computation; and to this claim a tender may be pleaded;—but a claim for intervening damages, which must depend upon the loss the plaintiff may have sustained by the delay, in the failure of the collection of his debt, either in whole, or in part, by the change of circumstances of the debtor, is unliquidated, depending upon the finding of the jury; and to this claim a tender cannot be pleaded.

Where the declaration, in such case, includes a claim for additional costs, and also for intervening damages, a plea of tender to the entire declaration is bad on general demurrer;—but *per HALL, J.*, the defendant might, in such case, have pleaded a tender of the additional costs, and traversed the assignment of the breach for intervening damages.

Where the plaintiff, in such case, claims to recover intervening damages, the defendants may show the real condition of the appellant's property, at the time final judgment was obtained against him in the suit appealed; and they may do this, notwithstanding the sheriff, to whom the execution, issued upon that judgment, was delivered for collection, returned thereon that he could find no property of the execution debtor.

In this case both parties took exceptions in the county court, and the judgment being affirmed in the supreme court, no costs in the supreme court were allowed to either party.

SCIRE FACIAS upon a recognizance for the prosecution of an appeal from the judgment of a justice of the peace, in which the defendant Shurtliff was principal, and the defendant Bell was surety. The defendants pleaded *nul tiel record*, and also pleaded, that, after the commencement of this suit, and more than three days before the sitting of the court to which the writ was made returnable, they tendered to the plaintiff the additional costs in the appealed suit and the interest upon that judgment, and the costs which had then accrued in this suit,—which sum they brought into court. To the latter plea the plaintiff demurred; and the county court, June Term, 1843,—*Royce, J.*, presiding,—adjudged the plea insufficient;—to which decision the defendants excepted. Upon the first plea issue was joined to the court.

On trial the plaintiff gave in evidence the execution, which issued upon the original judgment in favor of the plaintiff against Shurtliff, and the officer's return thereon of *nulla bona*. The defendant Bell then offered evidence tending to prove, that Shurtliff, at the

Smith, *q. t., v. Kiane.*

to Julia Wheelock was not within the issue, which was made by the parties. It is not even averred, that this alienation of the land to Julia Wheelock was made with intent to defraud anyone. This alienation, at most, would only be evidence, that the defendant justified the conveyance made to him by the Goodwins, in *the manner and for the purpose* for which it was made. Nor did this alienation of the land to Julia Wheelock tend to prove, that the same was done to defraud creditors; and we cannot perceive how any such legal presumption arises upon the conveyance, as seems to have been supposed by the county court. It did not, as we think, shift the burden of proof, and impose upon the defendant the necessity of showing that the conveyance was *bona fide*. But it is a sufficient answer to this part of the case, that it was not within the issue.

If, then, the plaintiff is entitled to recover in the present case, it must be upon the ground, that the deed from the Goodwins to the defendant was made and received with a fraudulent intent, which existed in both parties; and this intent must be found by the jury. *Brooks v. Clayes et al.*, 10 Vt. 37. If, in fact, the defendant took the conveyance from the Goodwins in *good faith* for the purpose of securing a debt due to him, he had a lawful right so to do, and he would not thereby subject himself to the penalty for a fraudulent conveyance; and, in the judgment of the court, the case should have been so put to the jury. The charge, we think, was clearly erroneous.

The judgment of the county court is reversed.

Joslyn v. Tracy.

TIMOTHY JOSLYN v. THOMAS TRACY.

Whenever new matter is introduced in any of the pleadings in a suit, the plea should conclude with a verification.

Where the defendant, in an action of trespass, justifies the taking of the property by virtue of a rate bill and warrant, and the plaintiff replies a tender of the amount of the tax and interest, a rejoinder, that the defendant was entitled to and claimed travelling fees, in addition to the tax and interest, and that therefore the tender was insufficient, should conclude with a verification.

If the collector of a tax, after having demanded of a person named in his rate bill the amount of his tax, perform travel for the purpose of distraining property for the payment of such tax, he is entitled to his fees for such travel; and a tender, after such travel is performed, of the amount of the tax and interest is insufficient, if the collector claims his travel fees.

A sheriff, holding an execution for collection, is not obliged to receive the amount of the execution and interest, though tendered to him by the debtor before any levy is made, unless his fees are also offered to him. KELLOGG, J.

TRESPASS for taking a horse. The defendant pleaded the general issue, and also, in bar, that he was collector of taxes in the town of Morristown, and, as such, held a rate bill and warrant requiring him to collect a tax from the plaintiff of ninety-nine cents, that he repeatedly called on the plaintiff for the tax, and notified him when and where he would receive it, that, particularly, on the fourth day of March, 1844, he demanded payment of the defendant, at Brownington,—which the plaintiff refused,—that on the 7th of September, 1844, he again demanded the tax, at Brownington, with the interest and fees, and that, upon the plaintiff's refusing to pay the same, he afterwards distrained and sold the horse in question,—which was the trespass complained of. The plaintiff replied, that immediately upon the first application of the defendant to the plaintiff for the payment of the tax, to wit, at Brownington, on the 31st day of August, 1844, and before the defendant had proceeded to distrain the horse in question, he tendered to the defendant the full amount of the tax and interest, being one dollar and twenty-five cents, and that the defendant refused to receive the same. The defendant rejoined, admitting that the tender was made and refused, as averred in the replication, but alleged, that, the plaintiff having neglected and refused to pay the tax at the time and place appointed by the defendant, and hav-

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The statute, under which this tender was pleaded, (Rev. Stat. chap. 106, sec. 6,) was not, as we think, intended to extend the right of making a tender to other actions, than those in which a tender might be made at common law; but the object of it was, to allow a tender after action brought,—which, without the statute, could not be made.

There seems to be no doubt in regard to the principle, upon which a tender is allowable at common law. It may be made in all cases, where the demand is in the nature of a debt, where the sum due is either certain, or is capable of being made certain by mere computation; but is not allowed, where the action is for unliquidated damages, the amount of which is to be determined by the exercise of discretion by a jury. Chit on Cont. 793. 3 Stephens' N. P. 2599.

It seems too manifest to require argument, or illustration, that the breaches of the condition of the recognizance in this case, assigned in the declaration, embrace both these descriptions of claims. The additional costs named in the recognizance are mere matters of computation; while the intervening damages, which depend upon the loss the plaintiff may have sustained by the delay, in the failure of the collection of his debt, either in whole or in part, by the change of circumstances of the debtor, are manifestly unliquidated damages, which it is peculiarly the province of a jury to estimate. To this part of the claim we think a tender could not be made; and as the plea of tender applies to this part of the declaration, as well as to the others, we feel constrained to hold it insufficient and bad.

It is not intended to say, that a plea of tender could not, under any circumstances, be available in an action upon a recognizance of this description. It has long been held in this state, that a matter of defence, which goes only to a part of the plaintiff's claims, may be pleaded to so much as it tends to meet. *State Treasurer v. Holmes*, 4 Vt. 110. In *Carpenter v. Briggs*, 15 Vt. 34, which was debt on a jail bond, it was held, that a plea of payment of a part of the plaintiff's claim was good for so much of the declaration, as it professed to answer; but, as there was no answer to the residue of the declaration, the plaintiff had judgment. If the defendants, in this case, had pleaded a tender of the additional costs, and traversed

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the assignment of the breach for intervening damages, it is not seen why the whole declaration would not have been well answered. In such case, if the plaintiff failed to prove any intervening damages, the defendants would have had judgment. But if there were intervening damages, the tender would, of course, have been unavailing. We see no mode, consistent with the principles of law and the rules of pleading, by which any greater effect could be given to a tender, in cases of this description, than to make it effectual, where there is no real claim for unliquidated damages. This decision upon the substance of the plea renders any examination of its particular alleged defects unnecessary.

The plea of tender having been overruled by the county court, a question arose, upon the assessment of damages, in regard to the admission of evidence; upon which the plaintiff excepted to the ruling of the court; and that question has also been argued before us. The plaintiff having introduced the execution issued at the date of the judgment in the original suit, with the officer's return of *nulla bona* thereon, the defendant was allowed to prove, notwithstanding such return, that the debtor had, at the date of the judgment and of the return, personal property, subject to attachment, upon which the execution might have been levied. The inquiry as to the condition of the property of the debtor was proper, in ascertaining the damages the plaintiff had sustained by the delay; and we do not think the defendants were estopped, by the officer's return, from showing the real condition of the debtor's property. The result is, that the judgment of the county court is affirmed.

Both parties having excepted, and the exceptions of neither having prevailed, neither is entitled to costs in this court.

Sawyer v. Doane.

JOSHUA SAWYER v. JOSEPH DOANE.

An execution issued by a justice of the peace, which is renewed by erasing the date and inserting a new date, after it has been delivered to an officer for collection, but before service has been made, and within its life, is not thereby rendered absolutely void, so that it may be set aside on *audita querela*.

AUDITA QUERELA, brought to set aside an execution against the plaintiff. Plea, the general issue, and trial by jury, June Term, 1845.—*Royce, J.*, presiding.

On trial it appeared that the execution in question was originally issued with the date of August 27, 1842, and that, when it had nearly expired, and after it had been delivered to an officer for collection, but before any service had been made, the justice, who signed it, altered its date, at the request of the creditor, to September 27, 1842, and that it was then served by arresting the body of the plaintiff.

The county court rendered judgment for the defendants. Exceptions by plaintiff.

L. P. Poland and J. Sawyer for plaintiff.

Wires and White for defendant.

BY THE COURT. It is impossible to admit, that an execution issued by a justice of the peace, and which is *revived*, (or *renewed*, as it is usually denominated in this state,) by carrying the *date forward*, is therefore absolutely void, so that it may be set aside by *audita querela*. The practice may not be the most judicious, perhaps,—certainly not the most *clerk-like*; but we see no good reason, whatever, to consider such an execution void.

NOTE by REDFIELD, J. The court esteemed the above case as worthy of being reported, as matter of practice, in order to discourage what was, at one time, very common in this state,—so much so, as to have acquired a technical name almost,—that of “*renewing*” executions by carrying the *date forward*. This is a practice, which it is presumed is coeval with the existence of the State, and which was, very probably, brought here from Connecticut,—from whence we derive much of our *lex non scripta*, or *local common law*. The practice is still sanctioned

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there, as we infer from the case of *Roberts v. Church*, 17 Conn. 142,—where the court held, that the *renewed* execution is to all intents *the same execution* it was before its renewal, and not an *alias*, in any such sense as to require the officer levying the same to begin *de novo*. This does seem to us carrying the matter farther, than is entirely consistant. But the decision there made is no doubt justifiable upon other less objectionable grounds,—that is, that no demand upon the debtor is necessary to the validity of the levy of an execution upon real estate. This is the settled law of this and some other of the American States,—thus treating the statute as *directory* to the officer, and making him liable, in an action upon the case, for omitting the demand, but regarding the *levy* as *valid*.

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RUSSELL B. HYDE v. GAMALIEL TAYLOR AND JOHN T. MATTHEWS.

The statute,—Rev. St. c. 42, § 48,—which authorizes the supreme court, upon petition, to vacate an irregular levy of execution upon real estate, is not restricted to defects which are apparent upon the face of the levy,—but extends to a case, where the officer, intending to levy upon the life estate of the debtor in land, subject to a mortgage, by mistake caused the fee simple to be appraised, and levied upon the entire equity of redemption.

That statute is remedial, and, as such, should receive a liberal construction, so as to advance the remedy.

THIS was a petition to the supreme court to vacate the levy of an execution, in favor of the plaintiff against the defendants, upon land of the defendant Taylor, and was founded upon the Revised Statutes, chapter 42, section 43.

It appeared, that the execution in question was placed by the plaintiff in the hands of one Noyes, constable of Hyde park, with directions to levy it upon certain land, subject to a mortgage, in which Taylor had a life estate, and that the officer attempted to levy upon the life estate, but, by mistake, the appraisers appraised the fee simple, and ascertained the value of the equity of redemption by deducting the amount of the mortgage from that sum, and the officer

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levied upon the entire equity of redemption, thus ascertained, instead of levying upon the life estate. The return was in the form, given in the Revised Statutes as a levy upon land.

Smalley & Phelps for petitioner.

Upon the facts found it would seem, that the levy was, in the language of the statute, "irregular, informal, and not made according to the strict rules of law," and that the title derived therefrom is doubtful,—so that, under that statute, the petitioner is entitled to have the levy corrected.

Poland and Wires & White for defendants.

1. The statute does not include a levy defective in substance as to the *subject matter*, but includes all matters of form. It cannot be extended to a levy on the wrong land, or a levy on land instead of the equity of redemption, or a levy on the land, instead of a life estate. *Bell v. Roberts*, 13 Vt. 582.

2. In order to bring the case within the statute, there must appear, upon the face of the return itself, some irregularity, or informality, or some defect which shows that the levy was not made according to the strict rules of law. The return is literally after the form given in the statute.

The opinion of the court was delivered by

REDFIELD, J. The words of the statute, under which this proceeding is had, are, that when the levy shall be "irregular, informal, or not according to the strict rules of law, so that the title shall be doubtful," this application may be made to this court, and the levy be vacated, or affirmed, as the case may require, upon hearing.

It is claimed, that the present remedy is confined to those defects, which are *apparent upon the face of the levy*. But we think not. Such clearly is not the language of the statute. That is extensive enough to reach almost every case of defective levy. Before the enacting of the present statute, it had been decided by this court, that, when the defect was *apparent* upon the record, a new execution might be obtained by *scire facias*. *Royce v. Strong*, 11 Vt. 248. Such had long been the understanding of the profession, before any such remedy as the present was first provided by statute in 1837,—

Hyde v. Taylor et al.

which formed the basis of the present Revised Statutes, upon that subject. But when the defect did not appear of record, neither debt nor *scire facias* would lie. That seems to us to have been one of the evils intended to be remedied by the statute. And now, for this court to so construe this act, as to exclude the very cases intended to be reached, would be, in effect, to repeal it by construction.

It is also a remedial statute, of a highly beneficial character, for the relief of faithful officers, who, through inadvertence, or error in judgment, or other cause, have failed to comply with all the requisites of the law, and should receive a large and liberal construction, so as to advance the remedy and prevent, or cure, the evil.

The levy is vacated, and a new execution awarded.

WINDHAM COUNTY.

FEBRUARY TERM, 1844.

[Continued from Vol. 17, page 347.]

KELLY v. HASKELL.

Where the plaintiff recovered judgment in the court below, and the defendant filed exceptions, but execution was not stayed, and the defendant neglected to prosecute the case in this court, it was held, that this court would affirm the judgment, and also, that the plaintiff was entitled to costs in this court, unless he had reasonable notice, in writing, before the commencement of the term, that the case would be abandoned.

In this case the county court rendered judgment for the plaintiff, and the defendant tendered a bill of exceptions, which was allowed, and the case was passed to this court; but execution was not stayed. In this court the defendant did not prosecute his exceptions, and a question was made to the court in regard to the *form*, in which judgment should be entered up for the plaintiff. The plaintiff, having collected the amount of his judgment, only desired to be made safe in regard to retaining it, and to recover his costs for defending against this proceeding.

THE COURT said, they thought the party entitled to cost for defending this proceeding upon exceptions, unless he was reasonably satisfied, before the session of the court, that it would be abandoned; that to defeat his claim for cost, the practice of the court would seem to require that the notice should be *in writing*; that although, in a case where the execution is not stayed, there is no positive necessity that the judgment should be here affirmed, yet that that is the usual course and the correct *form* of entering up the judgment; and judgment was thereupon so entered up in this case.

GRAND ISLE COUNTY.

JANUARY TERM, 1846.

HAZEN v. HAZEN.

Temporary alimony not allowed to the wife, to enable her to prepare her defence to a libel for divorce, preferred by the husband.

THIS was a libel for divorce, brought by the husband, which was resisted by the wife. The counsel upon the part of the wife moved the court to allow her temporary alimony during the pendency of the libel,—chiefly to enable her to prepare her defence.

THE COURT denied the motion, upon the same ground as in the case of *Harrington v. Harrington*, 10 Vt. 505.

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ADDISON COUNTY.

JANUARY TERM, 1846.

[Continued from Vol. 18, page 613.]

JERUSHA BROWN v. JOSIAH DAVIS, and JAMES M. HACKETT, Trustee.

[Same Case, 18 Vt. 211.]

A trustee, who excepts to the decision of the county court charging him as trustee, and brings the case into this court, and does not prevail upon his exceptions, either in whole, or in part, will not be allowed to retain, out of the funds in his hands, his costs in this court;—neither will he be required to pay the costs of the opposite party in this court.

Brown v. Davis & Tr.

THIS case came into this court upon exceptions, taken by the trustee to the decision of the county court, by which he was held chargeable ; and the judgment of the county court was affirmed. After the cause was decided, a question was made to the court, whether the trustee was entitled to retain, out of the funds in his hands, his costs in this court.

BY THE COURT. We think that the trustee, under the circumstances of this case cannot recover costs. If we were to follow out strictly the equity of the case, in its analogies to appeals, by the trustee, from decisions of justices of the peace, and where formal writs of error are brought by trustees, we should require the trustee in this case to pay costs, as, in both the instances referred to, he is required to do, if he finally fail to recover, or to obtain any relief from the former judgment, either in whole, or in part ; Acts of 1842, p. 17, §§ 6, 7 ;—And see, also, the general rules of this court in regard to taxing costs upon writs of error. But, presuming the exceptions to have been taken and prosecuted in perfect good faith, and not for purposes of delay merely, we do not require the trustee, in this case, to pay costs. There is, perhaps, a difference between the situation of a trustee,—who is a mere go-between, or middle-man, in regard to the real parties in interest,—and that of the actual parties to a suit. It is matter of indifference to the trustee, to which of two claimants he surrenders the property ; but in a case of serious doubt he may have some reason to desire the opinion of the court of last resort ; and where he prevails in part, only, he should doubtless retain his costs ;—but, so far as his own costs are concerned, he must, we think, judge, at his peril, whether the judgment of the county court is reliable.

RUTLAND COUNTY.

FEBRUARY TERM, 1846.

[Continued from Vol. 18, page 304.]

EXECUTORS OF PETER STEVENS v. HARTLEY HOLLISTER.

[Same Case, 18 Vt. 294.]

A defendant, who takes exceptions to the decision of the county court, and who prevails upon his exceptions, is entitled to have his costs in the supreme court deducted from the plaintiff's costs in the court below, even though the plaintiff ultimately prevail in the case.

In this case the county court rendered judgment for the plaintiff for full damages, and the defendant took exceptions. This court reversed the judgment of the county court, upon the ground that the rule of damages adopted was erroneous, but held, that the plaintiff, upon the facts found, was entitled, if he so elected, to have judgment for nominal damages;—and judgment was accordingly so rendered. A question was then made in regard to costs.

By THE COURT. The defendant, having prevailed upon his exceptions in this court, is entitled to costs here, to be deducted from the plaintiff's costs in the court below, even though the plaintiff finally prevail in the case. This rule may be esteemed, *in terms*, perhaps, somewhat different from that laid down by this court in 1 Aik. 409, but is certainly not different in principle. The rule here declared has been practiced upon for many years past, in taxing bills of cost in this court, and is believed to be more equitable and more salutary, than to have the right of the party, prevailing in this court, to recover cost, depend upon his ultimately prevailing in the suit. But we do not allow him an execution for costs immediately upon his prevailing in this court, but only the right to deduct his costs of this court, upon the *ultimate taxation*, if the other party finally prevail.

WINDHAM COUNTY.

FEBRUARY TERM, 1846.

[Continued from Vol. 18, page 341.]

CHESTER ALLEN v. MARTIN HARD.

Where exceptions were taken to the decision of the county court, but execution was not stayed, and the excepting party gave notice to the opposite party, *four days* before the session of the supreme court, that he should not prosecute his exceptions, and now desired the court to order the case struck from the docket as a mis-entry, the court refused so to order, but held, that judgment must be affirmed, unless the party elected to be heard upon his exceptions.

In this case judgment was rendered in the county court for the plaintiff, and the defendant took exceptions, which were allowed, but execution was not stayed. The defendant gave notice to the plaintiff, four days before the session of this court, that he should not prosecute his exceptions, and directed the clerk not to enter the case upon the docket, and now desired to treat it as a mis-entry,—to which the plaintiff objected.

By THE COURT. Such a practice would be very loose, and attended often with inconvenience, inasmuch as the excepting party might still bring a writ of error, if he should hereafter find that such a course might be for his advantage;—so that nothing would be settled by this mode of disposing of the suit. The notice, too, in this case, seems much too short. *Twelve days* is the shortest period, which will excuse the excepting party from *paying costs* to the other party; and such notices should always be in writing,—as has been often held by this court. Under the circumstances, unless the parties agree to a different course, the judgment must be affirmed, unless the party elect to prosecute his exceptions.

The excepting party electing to be heard, the cause was continued for argument.

*Howe et al. v. Jamaica et al.**Livermore v. Bond.*

HORACE HOWE AND OTHERS v. TOWN OF JAMAICA AND OTHER TOWNS.

A petition for a highway through several towns, which omits to state that the petitioners are freeholders of the towns and vicinity through which they desire a road, may be amended, by consent of the petitioners, if the facts will warrant the averment.

PETITION for a highway. There had been no appearance on the part of the petitionees. The court, at a former term, had appointed commissioners, who made a report at the present term in favor of the prayer of the petitioners. The counsel for the petitioners now moved for leave to amend the petition, by inserting therein an averment, that the petitioners were "freeholders of the towns and vicinity," through which they desire a road.

THE COURT said, that this, being a salutary requisition, had been held to be an indispensable averment; but that they had always treated it as a defect in its nature amendable by consent of the petitioners, if the facts would warrant the averment.

Leave was accordingly granted to amend according to the fact.

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SAMUEL LIVERMORE v. R. & A. BOND.

This court will not order security to be given, by way of recognizance, for costs in the case in the county court, either past, or future, nor for costs in this court, where the case came into this court upon exceptions.

THIS was an appeal from the decision of a justice of the peace, and was brought into the county court by the defendants. The county court rendered judgment in favor of the defendants, and the

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case was brought into this court by the plaintiff, upon exceptions. Upon the first day of the term the counsel for the defendants moved for an order upon the plaintiff for additional bail, to secure the defendants' costs in this court, and also costs which had already accrued in the county court.

BY THE COURT. We clearly have not the power to order additional bail here, with a view to secure costs in the county court, whether past costs or future. And in regard to costs in this court, it has not been usual, in practice certainly, to require a recognizance to secure them. And as the statute allows the excepting party in the county court to bring the case into this court upon motion merely, and without annexing any such condition, as is required in bringing writs of error, that recognizance shall be given to secure costs to the defendant in error, it is, perhaps, more natural and more reasonable to conclude, that no such security was expected to be given in cases like the present. In the case of writs of error, where the execution is stayed, as it now seems to be in all cases, from the time the writ is duly served upon the adverse party, upon making affidavit of *bona fide* confidence in its merits, the important thing to be secured is often the damage, which may be suffered in consequence of the delay. In regard to that, doubtless, the county court should require the excepting party to keep the other party safe, so far as it can be done by way of recognizance, or else not order stay of execution. But the costs in this court are so unimportant, that the legislature have not seen fit to require security in regard to them.

CHITTENDEN COUNTY.

DECEMBER TERM, 1846.

[Continued from ante, page 109.]

HANNAH MILLS v. SAMUEL E. WARNER.

The cases, where it has been held that there was a sufficient change of possession of personal property, after sale, notwithstanding acts of intermeddling with the property by the vendor, which might amount to a seeming joint possession with the purchaser, are cases where, nevertheless, the purchaser alone had control and was the visible head and conductor of the business, in which the property was used, or employed. But where the vendor is the sole conductor of the business, and his possession and use of the property is not interrupted, the sale will be void as against creditors, notwithstanding the purchaser may own the farm upon which the property is used after the sale, and may live upon it with the vendor.

Where the purchaser of personal property had exclusive possession of the property for three or four weeks after the sale, and then the property went into the possession of the vendor and was used by him permanently in his own business, it was held, that the sale was void, as against a creditor of the vendor, who subsequently attached the property while thus in the possession of the vendor.

And where a portion of the property sold in such case, and thus possessed by the vendor after the sale, consisted of a horse; and the vendor subsequently, for the convenience and advantage of his own business, and, for aught that appeared, in his own name and ostensibly on his own account, exchanged this horse for another horse, it was held, that the horse thus substituted became as much a means of false credit, as the other had been, and that, while it thus remained in his possession, it was liable to attachment upon his debts.

TRESPASS for taking a wagon, a mare and a fanning mill. Plea, the general issue, and trial by jury, March Term, 1845,—BENNETT, J., presiding.

The plaintiff claimed title to the property in question by virtue of a purchase from her son, Charles Mills, in March, 1843; and she gave evidence tending to prove, that at that time she purchased of Charles Mills a pair of horses, a sleigh, a harness, and the wagon

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and fanning mill in question, in payment of a debt due to her from Charles Mills and Claudius Mills; that she then lived with her son Myron Mills, in Burlington; and that, immediately upon the sale, she caused Myron to take the horses, sleigh and harness to his house, and that they were kept there, for the use of the plaintiff, from two to four weeks. It appeared, that the plaintiff had a life estate in a farm in Colchester, which had been carried on by Charles Mills and Claudius Mills for two or three years previous to April, 1843, and that the property, claimed to have been purchased by the plaintiff, had, during that time, been kept and used upon the farm; that in April, 1843, the plaintiff contracted with Charles Mills to cultivate and manage this farm, upon shares, for two years, and that he continued in possession, for that purpose, until the time of this trial, and that during all this time, the plaintiff has resided upon the farm with him; that the wagon and fanning mill remained upon this farm, until they were attached by the defendant, in February, 1844; that in April, 1843, and from two to four weeks after the sale of the property to the plaintiff, the horses, sleigh and harness were taken back to the farm; and that the entire property, after that, was used by Charles Mills, in carrying on the farm, the same as it had been before the sale. It also appeared, that in the fall of 1843 Charles Mills exchanged one of these horses, which he had before sold to the plaintiff, for the mare sued for in this action; and that the mare was taken by him and used upon the farm, in the place of the horse, from that time until the time of the attachment. It also appeared, that in February, 1844, the property sued for was attached, as the property of Charles Mills and Claudius Mills, and that it was subsequently sold upon an execution in favor of the defendant against them,—which was the trespass complained of,—and that, at the time of the attachment, the property was upon the farm in the occupancy of Charles Mills, as above mentioned;—but it was shown that the officer, at the time of the attachment, had notice that the property belonged to the plaintiff.

Upon these facts the county court directed a verdict to be returned in favor of the defendant. Exceptions by plaintiff.

George K. Platt and A. Peck for plaintiff.

1. The facts reported show such a change of possession, as makes

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this sale valid, within the rule laid down in *Wilson v. Hooper et al.*, 12 Vt. 653.

2. But, however the sale may have been as to attaching creditors, it was good, as between Charles Mills and the plaintiff, and vested the whole property in her. When the plaintiff, then, sold the horse for the mare in question, this made the sale perfect, so far, even, as against creditors, and left only the question, as to whose was the property in the mare;—which was entirely a question of fact, and should have been left to the determination of the jury.

H. Leavenworth and Smalley & Phelps for defendant.

1. As to the wagon and fanning mill, there is no pretence of any change of possession, unless based upon the fact, that some two or three weeks after the sale the plaintiff went to reside with Charles Mills upon the farm where the property was kept,—though he carried on the farm and used the articles in question. And in answer to this it is sufficient to say, that it has been repeatedly decided by this court, that a joint possession and control by vendor and vendee of personal property is never sufficient, as against creditors; but the possession must be permanent, visible and exclusive on the part of the, vendee. *Weeks v. Wead*, 2 Aik. 64. *Allen v. Edgerton*, 3 Vt. 442. *Emerson et al. v. Hyde*, 8 Vt. 352. *Wilson v. Hooper et al.*, 12 Vt. 653. *Rockwood v. Collamer et al.*, 14 Vt. 141.

2. The ownership of the mare would of course be determined by the ownership of the horse, for which it was obtained; and the horse stands upon precisely the same footing with the other property, except that there was a change of possession of from two to four weeks. It is manifest, that this does not amount to the substantial, permanent and visible possession, which the court has always held necessary. *Weeks v. Wead*, 2 Aik. 64. *Dewey v. Thrall*, 13 Vt. 281. *Rogers v. Vail et al.*, 16 Vt. 327. *Stiles v. Shumway*, 16 Vt. 435.

The opinion of the court was delivered by

Royce, Ch. J. The case does not find, that the plaintiff took and maintained any other possession of the wagon and fanning mill, than such as should be implied in her ownership of the farm, and her residence upon it. But the contract with her son Charles, by which he was to carry on the farm for two years upon shares,

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implied a right in him to possess and use this property in the execution of that contract. And it appears, that he accordingly did continue to possess and use it, as he had done before he sold it to the plaintiff. Under these circumstances it is clear, that the plaintiff's interest in the farm and her residence upon it were not sufficient to protect her purchase of this property, as against the creditors of Charles. The facts do not make a case like *Allen v. Edgerton*, 3 Vt. 442, *Hall v. Parsons*, 15 Vt. 358, and others of that class. In those cases, although there were acts of intermeddling with the property by the vendor after the sale, which might amount to a seeming joint possession with the purchaser, yet the purchaser alone had control, and was the visible head and conductor of the business in which the property was used, or employed. But here Charles was the sole conductor of the business. And as his possession and use of this portion of the property was never interrupted, the sale to the plaintiff must, thus far at least, be deemed fraudulent and void, in law, as against the defendant, a creditor of the vendor.

The plaintiff's right to recover for the mare must rest upon one, or both, of the two following grounds:—1, On the ground of her actual and exclusive possession of the horses bought of Charles, for a few weeks succeeding the purchase in March, 1843. It was decided in *Farnsworth v. Shephard*, 6 Vt. 521, that, if the purchaser of a horse takes actual and exclusive possession, and holds it for a period sufficient to render his possession and ownership notorious and well understood in the neighborhood, his title will be protected against a creditor of the seller, who afterwards attaches the horse, while in possession of the seller for a mere temporary purpose. It will be noticed, however, that the possession of the purchaser had been of much longer continuance in that case, than the present. And should we even admit, that the period, in this instance, was sufficient to satisfy the rule, yet the subsequent possession and use of the horses by Charles were not, as in the case cited, for a temporary purpose only. He had the permanent possession and use, and that in his own business. This is decisive against the plaintiff's right to recover, so far as it rests upon her own previous possession.

2. The other ground is, that Charles never owned the mare in question,—which was obtained in exchange for one of the horses bought of him. It is certain, that the case is not within the terms of

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the rule of law, as hitherto enforced. Where it has appeared, that the debtor, in possession of the property, had possessed it in no other right than as bailee to the owner, the doctrine of constructive fraud has not been helden to apply. *Spring et al. v. Chipman*, 6 Vt. 664. But the doctrine should be held to comprehend a new case, when that is found to come fully within the reason and policy on which the doctrine is founded. And the present is obviously such a case. In principle and policy no distinction can be allowed, in reference to a creditor's right, between the horse in question and the one for which it was substituted. We do not decide, how this might be, had the exchange been made by the plaintiff herself, or by some third person acting as her agent; but here it was made by the debtor, for the convenience and advantage of his own business, and, for aught that appears, in his own name' and ostensibly on his own account. The horse obtained in exchange became as much a means of false credit, as the other had previously been; and justice to creditors would manifestly require, that it should be equally liable to their process. We therefore conclude, that the plaintiff has established no right to recover for any of the property claimed.

Judgment of county court affirmed.

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FRANKLIN COUNTY.

JANUARY TERM, 1847.

[Continued from ante, page 112.]

JOHN MORSE AND JOEL HOUGHTON v. HIRAM M. CARPENTER.

There is an important difference between a description of the grantees in a deed, which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications;—extrinsic evidence is not admissible, in the former case, to make the conveyance effectual

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in favor of any particular person; while in the latter case a resort to extraneous facts and circumstances may become necessary, and is proper, in order to ascertain the individual to whom the description was intended to apply.

Where the plaintiffs in an action of ejectment, who were partners, offered in evidence a mortgage deed, executed by the defendant, and conveying the demanded premises to the plaintiffs by the name of their style of partnership, which consisted of the surnames of the partners, omitting their christian names entirely and describing their place of residence, it was held, that evidence was properly admissible, to show that the plaintiffs were, at the time the mortgage was executed, doing business, as partners, at that place, and that the defendant executed to them, by the name of their firm, the promissory note described in the condition of the mortgage, and that, with this evidence, the mortgage deed was admissible, and, with proof of defendant's possession of the premises, entitled the plaintiff to a recovery.

EJECTMENT for land in Enosburgh. Plea, the general issue, and trial by the court, April Term, 1845.—ROYCE, J., presiding.

On trial the plaintiff gave in evidence a mortgage deed of the demanded premises, dated February 23, 1843, and executed by the defendant, in which the grantees were described as "Morse & Houghton, of Bakersfield," and proved, that the plaintiffs had lately been in partnership at Bakersfield, under the firm of Morse & Houghton, and that the note described in the condition in the mortgage, and which bore the same date with the mortgage, was executed by the defendant to the plaintiffs as such partners. To the admission of all this evidence the defendant objected; but the objection was overruled by the court. It then appeared, that the condition of the mortgage had not been complied with, and that the defendant was in possession of the demanded premises at the commencement of this suit.

Judgment for plaintiff. Exceptions by defendant.

Smalley, Adams & Hoyt for defendant.

The deed offered in evidence by the plaintiffs and admitted by the court, and on which, alone, the plaintiff's right to recover depends, was void for uncertainty in describing the grantees. 4 Cruise 218, § 14. 4 Com. Dig. 164 E 3; 308 A. 2 Ib. 170 B 4. The plaintiffs are not parties to the deed; and this defect cannot be cured by parol. 15 Vt. 215. 1 D. Ch. 227.

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W. C. Wilson and *A. O. Aldis* for plaintiffs.

1. A deed to a partnership, by the partnership name; is valid. It is not necessary to insert the particular names of each partner. Deeds *from* partners, using the name of the firm, are held valid, when the firm has power to deed;—deeds *to* the firm come within the same principle. *Dean v. Nutting*, cited in Washburn's Dig. 556. Gow on Part. 75.

2. Granting that the description of the grantees is imperfect,—it may be supplied by parol evidence. The intention is apparent from the deed, both in the description of the grantees and in the proviso describing the note, to convey to the firm; and the name of the firm and of its place of doing business are correctly described; nothing is wanting, to make the description perfect, but the christian names of the two partners. When an estate is deeded to a person, whose surname or christian name is mistaken, or omitted, parol evidence is admissible, to supply the omission, or correct the mistake. If this be so, surely the mere omission of a christian name may be supplied. 1 Phil. Ev. 539. *Price v. Page*, 4 Ves. 680. *Alexander v. Wilmorth*, 2 Aik. 413. *Miller v. Travers*, 8 Bing. 244. [21 E. C. L. 288.] *Conolly v. Pardon*, 1 Paige 291. *Beaumont v. Fell*, 2 P. Wms. 140. *Thomas v. Stevens*, 4 Jac. 607. *Smith v. Doe d. Jersey*, 6 E. C. L. 244. 3 Cow. & H. Notes to Phil. Ev., n. 938, pp. 1358-1378.

The opinion of the court was delivered by

ROYCE, Ch. J. If the description of the grantees was such as to render the deed void, there was error in admitting evidence to explain and aid that description. But the evidence was rightly admitted, if the ambiguity was legally capable of explanation. The only question, then, is, whether the description was thus fatally defective.

A sufficient description of the grantee in a deed is equally indispensable, as that of the subject to be conveyed. And, as instances of incurable uncertainty and defect in this particular, cases are put,—or recorded in the books,—of a grant, or devise, *to one of the sons of J. S.*,—*to the poor scholars of such a school*,—*to the poor relations of the grantor, or devisor, &c.* These, and the like cases, furnish illustrations, in reference to the grantee, of the *ambiguitas patens*, strictly so called,—an ambiguity not removable by construction, nor to

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be explained by evidence *aliunde*, without making more, or less, of the instrument, than its terms import. And hence, to make the conveyance effectual in favor of any particular person, by the aid of extrinsic evidence, would be, in the words of Lord Bacon, "to make that pass without deed, which the law appointeth shall not pass but by deed."

There is, however, an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it. Indeed, the most usual and approved description of the grantee,—that which gives his christian and surname and the town in which he lives, may prove to be imperfect, as others bearing both those names may be living in the same town. And if the christian name or place of residence be omitted, the description is only rendered the more imperfect; it is less certain than it might be, and usually is, made. But a grantee is still designated, though imperfectly, and, for aught that the deed discloses, the party accepting the conveyance may be the only person answering the description given. In all these cases, a resort to extraneous facts and circumstances may become necessary, in order to ascertain the individual, to whom the description was intended to apply; but it is not perceived, that the greater or less probability of this should, in either case, affect the validity of the deed.

It is said by the Master of the Rolls in *Colpoys v. Colpoys*, Jacob 451, (partially recited in Cowen & Hill's notes to Philips, p. 1360,) that the omission in a will of the christian name of a devisee, or legatee, does not defeat the bequest; but that evidence is received to identify the person. And I am aware of no decision, which has held otherwise in the case of a deed. A grantee may be described, without even the mention of christian or surmane, as by his name of office, or dignity, or by the party's relation to some other person,—as if called the wife, or eldest son, of J. S. All these descriptions are sufficient, on the ground that *id certum est, quod certum reddi potest.* 4 Kent 462. That the omission of the grantee's christian name *may* leave the description so defective, as to render the conveyance void, is, indeed, asserted by Cruise, in the section referred

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to by counsel, but asserted in qualified terms. He follows older books, in which it is said,—that the safe way is to set forth both the christian name and surname;—“For where the grant intends to describe the person of the grantee by his proper name, and omits or mistakes his christian name, or surname, commonly the deed is void, unless there be some special matter to help it. And yet, if the grant does not intend to describe the grantee by his known name, but by some other matter, there it may be good, by a description of the person without either name of baptism or surname.” Jacob’s Law Dict. Title, Deed.

There is no occasion to speak of a case, where the *surname* is omitted, or where either name is mistaken and a different one substituted; for no such case is before us. And when, as in this instance, the surname and place of residence are correctly given, and the christian name is simply omitted, I should be unwilling to receive these *dicta*, (not appearing to be founded upon actual adjudications,) as satisfactory authority for pronouncing the deed void. But, taken with the qualifications expressed, they are not, even in terms, opposed to the validity of this deed. Here is both special matter to help the description, and an evident design to describe the grantees otherwise than in the usual mode of setting out their respective names. The union of their surnames alone in the deed indicated the style and name of a partnership, in which their christian names would not be expected to appear; and evidence was properly received to verify such indication. That was the name by which they contracted with the defendant and took his note; and inasmuch as the true surnames constituted the partnership name, we think the mortgage to secure payment of the note might well be taken in that name.

Judgment of county court affirmed.

RUTLAND COUNTY.

FEBRUARY TERM, 1847.

[Continued from ante, page 222.]

**WILLIAM W. BAILEY v. SILAS W. HODGES, DUDLEY B. FULLER,
HORACE FULLER AND CHARLES H. RUSSELL.**

In an action on book account the non-joinder, as defendant, of one of the contracting parties is not waived by not being pleaded in abatement, but may be taken advantage of at the hearing before the auditor; and if the fact of such non-joinder is found by the auditor, judgment will be rendered, upon the report, in favor of the defendant.

And it makes no difference, in such case, that the omitted co-contractor resides out of this state, and that he and the other defendants were parties with another person, since deceased, in the business in which the plaintiff's account accrued, and contracted with him as such, and that, in describing the defendants in the writ, they are named as "surviving partners" of the person deceased,—the declaration being in common form, and making no mention of the partnership.

BOOK ACCOUNT. The defendants were described in the writ as "surviving partners of Henry Hodges, late of said Clarendon, deceased, in the lumbering and milling business at Castleton in the county of Rutland." The declaration was in common form. Judgment to account was rendered, and an auditor was appointed, who reported, that the defendants objected to the allowance of the plaintiff's account, upon the ground that William P. Russell, of the city of New-York, was not joined as a defendant in the suit. It appeared, that the accounts in the case accrued between the plaintiff, on the one side, and the Castleton Land Company, on the other, which was a partnership, consisting, at the time the accounts accrued, of the defendants, and the said Henry Hodges, deceased, and William P. Russell, of the city of New-York; and that the defendants and Henry Hodges never transacted business in company, except in connection with said William P. Russell.

The auditor also reported the facts in relation to the items of the

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accounts,—which it is unnecessary to detail,—and the county court, April Term, 1846,—WILLIAMS, Ch. J., presiding,—rendered judgment in favor of the plaintiff upon the report. Exceptions by defendants.

S. H. Hedges for defendants.

1. The non-joinder of William P. Russell is a defence to the action, and need not be pleaded in abatement. *Loomis v. Barrett*, 4 Vt. 450. *Goddard v. Brown*, 11 Ib. 278. *Smith v. Watson*, 14 Ib. 332.
2. It makes no difference, that the defendants and William P. Russell constituted a partnership; for the plaintiff had a right to testify, that he did not deal with the firm; and, from its not being named in the writ, the defendants had a right to infer that he looked to them alone.
3. The non-residence of a joint contractor doesn't justify omitting his name in the writ. In England he must be outlawed in the suit; and here he must be returned *non est inventus*. *Sheppard v. Baillie*, 6 T. R. 327. *Adams v. Bliss*, 16 Vt. 39.

Pierpoint for plaintiff.

There is no better established principle of law, than that, in an action founded on contract, the non-joinder of a person who should be made defendant is pleadable only in abatement. There may be a case, where an action on *book account* is commenced against a single individual, where the defendant might be justified in presuming that the plaintiff's account was against him alone, and that no other person ought to be joined in the suit. But in this suit the defendants are sued as partners, carrying on a particular business; the issue tendered by the declaration is a specific claim; and if the plaintiff has not included all the members of the partnership in his writ, the omission was apparent when it was served.

The opinion of the court was delivered by

BENNETT, J. It appears, that William P. Russell was one of the partners in the Castleton Land Company, and that he was not made a co-defendant in the suit. This was urged, before the auditor, as a reason why the report should have been for the defendants; and it

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is for us to consider the validity of this objection to the plaintiff's right of recovery.

It need hardly be stated, that, in actions at the common law, founded upon contract, a non-joinder of a defendant is only matter of abatement, and is of no avail upon the trial of the merits. In *Loomis v. Barrett*, 4 Vt. 450, it was held, that a different rule should prevail in our action on book account; and the reasons of that decision are quite obvious. The question, as to the true parties to the accounts presented for adjustment, is litigated before the auditor; and the parties themselves are witnesses to this point. No plea in abatement can be sustained, that puts in issue matter, about which it is competent for the plaintiff to testify. The parties cannot be examined as witnesses, except before auditors. It, of course, has been held, that all matters, about which the parties may testify, must be litigated at the audit.

We think that the case of *Loomis v. Barrett* must govern this. In that case, McGrath, who was a partner with Barrett, was not joined in the suit; and it was held, that the judgment to account was no waiver of the objection, and that it should avail the defendant on the trial before the auditor. In this case, the defendants in the writ are described as the surviving partners of Henry Hodes in the lumbering and milling business; but this is only matter of description. By the declaration the defendants are required to render to the plaintiff a given sum, which he says is justly due from the defendants to balance book accounts between them. They are not declared against as surviving partners; and no allusion is made in the declaration to such a fact. There is no reason, why the plaintiff might not recover against the defendants, on the record; if he could have established an account against them alone before the auditor. The plaintiff might also litigate a claim against these defendants, as the surviving partners of Henry Hodes. It is not necessary, in such case, to declare against the surviving partners, as such. If it had not been for the non-joinder of Russell, the plaintiff's account should have been allowed. The same difficulties, which prevented a plea of abatement from being interposed in the case of *Loomis v. Barrett*, could prevent one, in this case, for the non-joinder of Russell.

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The fact, that Russell resided without this state, cannot change the principle, which should govern the case. The process might have issued against him; and if no service could have been made upon him, he might have been severed from the other defendants by a *non est* return. See *Adams v. Bliss*, 16 Vt. 42. The case of *Loomis v. Barrett*, we think, must govern this case.

The judgment of the county court must therefore be reversed; and judgment be rendered, on the report of the auditor, for the defendants to recover their costs.

**TOWN OF PAWLET v. TOWN OF SANDGATE.**

The general rule is, that, for money accruing due under the provisions of a statute, the action of assumpait may be supported, unless another remedy is expressly given.

Assumpait will lie upon the statute,—Rev. St. c. 16, § 6,—which provides, that where an order of removal is made, and the pauper cannot be removed on account of sickness, the town procuring the order to be made shall support the pauper until he can be removed, and may recover the expenses of sickness and removal from the town to which the pauper was ordered to remove, if such town shall neglect to make payment for fifteen days after notice.

Parol testimony is admissible, upon the trial of such action, to prove that the pauper was sick at the time the order of removal was made, and continued so, so that he could not be removed without endangering life, until the time of actual removal.

The plaintiffs, in such action, may recover for all such charges and expenses, as they are legally bound to pay at the time of the commencement of the suit, notwithstanding the accounts may not then have been in fact paid.

And the plaintiffs may recover a reasonable compensation for the keeping and support of the pauper, notwithstanding it appears that an appeal was taken by the defendants from the order of removal, and that the pauper was maintained by an individual under a contract made with him by the plaintiffs, by which, if

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that suit was determined against the plaintiffs, he was to have a reasonable compensation, to be determined by arbitration, but if it went in their favor, he was to receive, for his compensation, after this suit was terminated, such sum as the plaintiffs should recover of the defendants in this suit for that item.

In such action the plaintiffs are entitled to recover interest upon the amount of their claim after the expiration of fifteen days from the time the notice of their claim, required by the statute, was given to the defendants.

But the plaintiffs cannot recover, in such action, for services rendered by a physician, who attended upon the pauper during his sickness, under a contract with the plaintiffs, that, if the plaintiffs succeeded upon the appeal from the order of removal, he should have a reasonable compensation for his services, but that, if the plaintiffs failed in that suit, he should receive nothing, although it appear that the plaintiffs did succeed upon the appeal.

Nor can the plaintiffs recover for services rendered to the pauper by a physician, the amount of whose account was not stated, as a distinct item, in the notice of the claim given to the defendants, although it appears that the amount of that account was included in another item in the notice, but without any specific designation.

And where it appeared, that the plaintiffs had contracted with an individual to maintain their poor for one year, during the time which elapsed after the order and before the removal, and the person, at whose house the pauper was, contracted with that individual, that, if the appeal from the order of removal terminated against the plaintiffs, he would receive \$2.50 per week for the support of the pauper, provided there should be no extraordinary expenses, it was held, that the plaintiffs, for that year, could only recover of the defendants the price thus agreed upon.

ASSUMPSIT, founded upon section six of chapter sixteen of the Revised Statutes.* The plaintiffs alleged, in their declaration, that

*By which it is enacted, that, "if such stranger, so ordered to remove, be sick or disabled, and cannot be removed without endangering life, the overseer shall provide for his maintenance, or cure, at the charge of such town; and, after the recovery of such stranger, shall cause him to be removed under said order:—And the town, in which he was last legally settled, shall repay all charges occasioned by the sickness, maintenance or cure of such stranger, and for his removal; and shall also repay all charges and expenses incurred, if he shall die before removal: And if the town, in which such stranger was last legally settled, shall not pay and satisfy all the charges and expenses, as aforesaid, within fifteen days after notice shall be given, in writing; the same may be recovered from such town, by an action to be brought in the name of the town making the disbursements.

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one Elizabeth Draper, on the 24th day of November, 1841, whose legal settlement was in Sandgate, came to reside in Pawlet, and was taken dangerously sick there, so that she could not be removed; that an order of removal was made by two justices of the peace, pursuant to the statute, ordering the pauper to remove to Sandgate by the 26th day of November, 1841,—of which notice was duly given to Sandgate; that an appeal was taken by Sandgate from this order, and such proceedings were had thereon, that the same was affirmed at the September Adjourned Term, 1844, of the Supreme Court in Rutland county; that the pauper continued sick, and unable to be removed, until November 19, 1844, when she was removed to Sandgate; that during all this time she was supported and maintained, at great expense, by the town of Pawlet; and that notice thereof had been duly given to Sandgate, pursuant to the statute. The declaration contained also a second count in *indebitatus assumpsit* for work and labor, care and diligence, for goods, &c., sold and delivered, and the money counts. Plea, the general issue, and trial by jury, September Term, 1845.—WILLIAMS, Ch. J., presiding.

On trial it was admitted, that the settlement of the pauper was in Sandgate, and that the order of removal, the affirmance of the order and the written notice to the town of Sandgate were made and given, as alleged in the declaration.

The plaintiffs then offered parol testimony, tending to prove that the pauper, at the time the order of removal was made, and from that time until she was actually removed, was sick, so that she could not be removed without endangering her life. To this evidence the defendants objected; but it was admitted by the court. The plaintiffs also introduced evidence tending to prove, that they had necessarily employed several physicians to attend upon the pauper during her sickness; and they claimed to recover for the services of Dr. Ezra Edson. But it appeared, that Dr. Edson rendered his services under a contract, made with him by the plaintiffs, that, if the settlement of the pauper should be determined to be in Sandgate, he should receive a reasonable compensation for his services, but if it should be determined that her settlement was not in Sandgate, he should receive nothing for his services;—and the court decided, that the plaintiffs could not recover for the services so rendered. The plaintiffs also claimed to recover the amount of an account for

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professional services rendered to the pauper by Dr. Edward Smith. But it appeared, that this account was not named specifically in the written notice given to the defendants, but was included in another item in the notice ;— and the court held, that, for this reason, the plaintiffs were not entitled to recover for this account.

The plaintiffs also introduced evidence tending to prove, that they employed James Leach to take care of and provide for the pauper, during the period between the making of the order and the removal, under an agreement, that, if the suit in relation to the settlement of the pauper, then pending, should be decided against Pawlet, he would receive such sum for compensation, as might be adjudged reasonable by arbitrators ; but that, if that suit should be decided in favor of Pawlet, then he should receive such sum as Pawlet might recover for him in this suit, after such recovery.

The physicians' bills and Leach's bill were presented on trial ; but no portion of them, or of any other bills presented, had been paid by the plaintiffs.

The defendants gave evidence tending to prove, that one William Pierce contracted with the plaintiffs to keep all the paupers of the town, and to indemnify the town against all expense of supporting paupers, for one year from the 19th day of March, 1842, and that the said James Leach, who had contracted with the plaintiffs to support and take care of the pauper, Elizabeth Draper, agreed with Pierce, on the first day of June, 1842, that in case the settlement of the pauper should be adjudged not to be in Sandgate, he would charge Pierce only \$2,50 per week for taking care of and supporting the pauper, provided there should be no extraordinary expenses incurred therein.

The defendants requested the court to charge the jury, that the plaintiffs could not recover for any of the bills presented by them, inasmuch as they had not been paid by the plaintiffs. But the court instructed the jury, that the plaintiffs were entitled to recover the amount of all such bills presented, as were necessarily and properly occasioned by the sickness, maintenance, cure and removal of the pauper, which the plaintiffs were, at the commencement of this suit, legally liable to pay ; and that it was not necessary, that the plaintiffs should have actually paid said bills.

The defendants farther requested the court to charge the jury,

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that the account of Leach could not, under the agreement proved by the plaintiffs, be recovered in this suit. But the court charged the jury, that the plaintiffs were, notwithstanding, at the commencement of this suit, legally liable to pay a reasonable compensation to Leach, and that they might recover in this suit for what they were holden to pay on that bill.

The plaintiffs requested the court to charge the jury, that the agreement made by Leach with Pierce did not affect the right of the plaintiffs to recover of the defendants a greater sum for the claim of Leach, than the rate of compensation which he had agreed to accept from Pierce ; and also, that the plaintiffs were entitled to recover interest upon the several bills embraced in their written notice to the defendants, from the time of the performance of the services and the incurring the expenses therein specified, until the time of trial. But the court instructed the jury, that the agreement made by Leach with Pierce limited the right of recovery of the plaintiffs for the services of Leach, during the whole year for which Pierce had contracted to keep the paupers of the town, to the sum of \$2,50 per week, unless there was extraordinary expense incurred during that time. The court also charged the jury, that the plaintiffs were entitled to recover interest, upon such sums as the jury should allow them as principal, only from the expiration of fifteen days next after the giving of the written notice to the defendants, as above mentioned.

Verdict for plaintiffs. Exceptions by both parties.

After verdict the defendants filed a motion in arrest of judgment for the insufficiency of the declaration ; but the court overruled the motion and rendered judgment upon the verdict for the plaintiffs ; to which decision the defendants also excepted.

D. Roberts, Jr., for defendants.

I. Upon the motion in arrest, the defendant contends, that the action should be "a special action on the case upon the statute." *Middlebury v. Hubbardton*, 1 D. Ch. 205. *Indebitatus assumpsit* will not lie upon the 6th section of the pauper act. Ib. It lies upon the 12th section, by reason of the express words of that section. *Danville v. Putney*, 6 Vt. 512. Although "assumpsit may be supported for money, &c., accruing due under the provisions of

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a statute," [1 Ch. Pl. 98,] yet it would seem to be in those cases, where "a right is liquidated by means of the statute," as in *Rann v. Green*, 2 Cowp. 474, where it is said, "when the *order* was made, the law raised an *assumpsit*." See *Dougl.* 10, n. 2, where a like opinion is stated with a "perhaps," &c.; and *King v. Toms*, *Dougl.* 401, where it is said (referring to *Rann v. Green*) "the plaintiff would *probably* have succeeded," &c. So in *Brookline v. Westminster*, 4 Vt. 224, the court being troubled to find any proper remedy, conclude that *assumpsit* was "as fit a remedy as any that had been mentioned."

II. As to the defendants' other exceptions;

1. The suit is to be in favor of the town *making the disbursements*, for *repayment* of charges, &c.,—language which implies a previous payment of charges by the plaintiffs, for money paid to the defendants' use; they must show an expenditure of cash, or its equivalent. *Burnap v. Partridge*, 3 Vt. 144.

2. The first contingency contemplated in the agreement between Leach and the plaintiffs, to wit, that the pauper might fall upon Pawlet, has not happened; of course, the provision applicable thereto, to wit, that Leach should have a reasonable compensation, &c., is not applicable here; but the provision here applicable is, that Leach shall have "such sum, as Pawlet may recover for him in this suit, and *after* such recovery." By the very terms of this agreement, therefore, the liability of Pawlet to Leach does not precede, but follows, a recovery here. If the inquiry be made, how, then, shall Leach recover his bill? we answer, whatever remedy he may have, it is against Pawlet, not Sandgate.

3. The instruction to the jury, to allow interest from fifteen days after the notice, &c., was peremptory, leaving nothing to their discretion. "The allowance of interest by the court, as incident to the debt, must be founded on the agreement of the party, expressed, or implied." *Everts v. Nason's Estate*, 11 Vt. 122. *Rensselaer Glass Factory v. Reid*, 5 Cow. 609, 614. Here was no express contract to pay interest;—but the argument is, that from fifteen days after the notice delay of payment was unreasonable, and so right and equity require the payment of interest, as damages for the delay, and that upon this equity, the law raises a promise. The answer is, that this claim, like all others arising under our pauper laws, is one

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strictissimi juris, with which equitable considerations have nothing to do. Besides, it does not appear, that Pawlet was bound to pay interest on any of these bills. Of course, she can recover none. But it appears affirmatively, that the term of credit with Leach had not expired; of course, Pawlet was not bound to pay him interest, and, of course, can recover none upon that bill. Again, this being a matter of strict statute right and obligation, the letter of the statute must control, and this is silent as to interest.

III. As to the plaintiffs' exceptions;—

1. The contract with Dr. Edson was in its nature a gambling contract, and so not favored of the law; *Collamer v. Day*, 2 Vt. 144. It was against public policy, leading to extravagance, recklessness, and the plunder of other towns, in cases where the greatest good faith ought to prevail. Therefore, however the matter may stand as between Dr. Edson and Pawlet, the contract ought not to be enforced against Sandgate.

2. *Dr. Smith's bill* was not named in the notice. Sandgate was entitled to notice in writing of "all the charges and expenses." She was entitled to notice, therefore, of this specific charge and expense.

3. That Leach's contract with Pierce limited his right against Pawlet to \$2,50 per week, for the year succeeding March 19, 1842, in the event that the pauper finally fell upon Pawlet, seems clear; since Leach could not claim of Pawlet a larger sum, than Pawlet could claim of Pierce, and that amount Leach had fixed by his contract. In the other event, the objections to a recovery for Dr. Edson's bill apply to a recovery for Leach's beyond \$2,50 per week.

G. W. Harmon and E. N. Briggs for plaintiffs.

1. The contract made with Dr. Edson was not invalid. The town of Sandgate cannot complain, as no more than a reasonable compensation was stipulated to be paid to him.

2. Dr. Smith's bill ought to have been allowed. A specific notice is not required by the statute, but only a general notice. Dr. Smith's bill was included in the total sum, of which notice was given, and the defendants were in no way prejudiced. *Newton v. Danbury*, 3 Conn. 553. *Goshen v. Stonington*, 4 Conn. 209. *Stratford v. Fairfield*, 3 Conn. 588.

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3. The agreement made by Leach with Pierce could not affect the right of the town of Pawlet to recover of Sandgate a reasonable compensation for keeping the pauper. But if Pierce was the agent of the town of Pawlet, and bound the town by the arrangement with Leach, as no consideration was received by Leach for abandoning his right to a reasonable compensation for keeping the pauper previous to that arrangement, and especially, as he did not thus abandon, the court erred in charging, that the plaintiff was entitled to recover only \$2,50 per week for the *whole year*, in which Pierce contracted to keep the paupers of the town of Pawlet.

4. Interest was most clearly allowable after the expiration of fifteen days from the demand; and we insist, that it should have been allowed from the time of rendering the services. 11 Vt. 122. 2 Vt. 536. 8 Vt. 258. *McIlvaine v. Wilkins*, 12 N. H. 474.

5. The statute does not require the justices to pass upon the ability of the pauper to be removed. The practice generally has been like that in the present case.

6. To entitle the plaintiffs to recover, it was not incumbent upon them to first *pay* the bills. The statute gives the right of action, not for moneys *paid*, but for expenses *incurred*; and it is sufficient that the plaintiff was *liable* to pay the bills. *Westfield v. Southwick*, 17 Pick. 68. *St. Johnsbury v. Waterford*, 15 Vt. 692.

7. The contract between Leach and the town of Pawlet bound the town to pay him a reasonable compensation; and hence, as the town was liable to him, the plaintiffs may recover the amount in this action.

8. The action is brought in the proper and approved form. *Rev. St. 102*, § 6; 104, § 12. *Slade's St.* 370, § 4; 372, § 11. *Middlebury v. Hubbardton*, 1 D. Ch. 205. *Fairfield v. St. Albans*, Brayt. 176. *St. Albans v. Georgia*, Ib. 177. *Londonderry v. Windham*, 2 Vt. 149. *Essex v. Milton*, 3 Vt. 17. *Danville v. Putney*, 6 Vt. 512. And any defects, which may appear in the declaration, are cured by the verdict. *Spencer v. Overton*, 1 Day 183. *Bliss v. Arnold*, 8 Vt. 252. Steph. on Pl. 148. *Martin v. Blodgett*, 1 Aik. 375. *Keyes v. Throop*, 1 Aik. 276. *Richardson v. R. & W. Turnp. Co.*, 6 Vt. 496. *Morey v. Homan*, 10 Vt. 565. *Battles v. Braintree*, 14 Vt. 348. *Lincoln v. Blanchard*, 17 Vt. 464.

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The opinion of the court was delivered by

BENNETT, J. The first question in this case relates to the form of action. The defendants claim, that it should have been a special action on the case, upon the statute, and that *assumpsit* cannot be sustained. The sixth section of the statute relating to the support and removal of paupers, upon which this action is based, does not prescribe the form of action. It simply declares, that the town making the disbursements may recover for them, *by an action* brought in the name of such town against the delinquent town.

The general rule is, that, for money accruing due under the provisions of a statute, the action of *assumpsit* may be supported, unless another remedy is expressly given. In *Bell v. Burrows*, Bul. N. P. 129, it was held, that general *indebitatus assumpsit* would lie to recover a sum of money awarded to be paid, by commissioners to divide common fields, under a private act of parliament. The case of *Rann v. Green*, Cowp. 474, was *assumpsit*, brought by the plaintiff to recover a sum which had been ordered to be paid to him as vicar of a certain parish, in pursuance of the provisions of a private act of Parliament. Lord Mansfield says, the statute was the only ground of action, and that without it there was no power to make the order; and where it was made, *the law raised an assumpsit*. There is no importance to the fact, that, in the case referred to, the amount of the claim had been liquidated by the order made under the statute. The right of action arose out of the statute. If the moneys accruing due under the provisions of a statute are uncertain in amount, they must be liquidated on trial; and such fact is of no importance, as it respects the form of action. If the law raised a promise to pay a sum of money accruing under a private act, certainly it would under a public act. See Doug. 10, n. 2.

The case of *Brookline v. Westminster*, 4 Vt. 224, is a full authority for this declaration. In that case there had been an order of court, upon the petition of the town of Brookline, against the town of Westminster, to pay a certain portion of the expense of building a bridge across what was called West River. The plaintiff town built the bridge, and then recovered in an action of *assumpsit* against Westminster, the sum in which they had been assessed. In that case the sum was liquidated on trial. Westminster had, under the statute, been assessed, not a specific sum, but only a given portion

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of the whole expense. The action was assumpsit in the case of *Londonderry v. Windham*, 2 Vt. 149. The first count alleged the sickness and expenses and notice correctly, but did not set out the order of removal; and the second count, which went for the expense of the order of removal and of the removal, omitted to allege any sickness to prevent a removal at the time the order was made. The declaration was held insufficient, upon demurrer, for these causes; but there is no intimation, either by counsel or court, that assumpsit was not a proper form of action. So in the case of *Essex v. Milton*, 3 Vt. 17, the form of the action was assumpsit. The case of *Danville v. Putney*, 6 Vt. 512, was an action of assumpsit, to recover for the support of transient poor, under the 11th section of the statute. Judge Collamer, in giving the opinion of the court, says, in substance, that it is sufficient, upon general principles, to state all those facts which the statute renders necessary to create the liability, and thereupon raise the assumpsit, without setting up or expressly declaring upon the statute;—and he adds, that this is the usual course on the fourth section of the statute,—which answers to the sixth section of the Revised Statutes. Upon this ground, the first count, which was special, setting up what was necessary to create the liability under the statute, was held sufficient. And in that case it may be said, that the 11th section provided, that the remedy might be “by an action for money laid out and expended.” Still it was held, that this was not imperative, and that a special assumpsit might be maintained. The case of *Middlebury v. Hubbardton*, 1 D. Ch. 205, was under the 11th section, and the court simply held, in that case, that a *general indebitatus assumpsit* will not lie for money laid out and expended, but that a case must be made, in the declaration, within this section of the statute. The remark of Judge Chipman, that, under the fourth section, it must be a special action on the case upon the statute, is extra-judicial.

On the whole, we think the first count in the declaration is well adapted to the plaintiff's case; and the motion in arrest was properly overruled.

The objection to the admission of parol evidence, to show the sickness of the pauper, &c., is without foundation. Indeed, it has been waived by the defendants' counsel in argument.

The charge of the court, that the plaintiffs were entitled to recov-

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er for all such bills, as they were legally bound to pay at the commencement of the suit, notwithstanding they had not then been paid, we think, was correct. By the sixth section of the statute, p. 102, the town of Sandgate was made liable to the town of Pawlet, to repay them *all charges*, occasioned in consequence of the inability of the pauper to be removed at the time of making the order, in maintaining and curing her, and in subsequently removing her to Sandgate. So far as the town of Pawlet have made themselves liable, such liability is necessarily *chargeable* upon the town; and so far as individuals may have rendered services in maintaining and doctoring the pauper upon the credit of Pawlet, such individuals may well be considered as their agents; and the town may well sustain the action, though they have not yet paid the sums due such individuals. *Westfield v. Southwick*, 17 Pick. 68.

The claim of James Leach is not to be distinguished from the other claims against the town of Pawlet. Let the suit in regard to the settlement of the pauper be determined as it might, the town of Pawlet was liable to Leach for a reasonable compensation; and in one event, what should be a reasonable compensation should be determined by arbitrators; and, in the other event, by the amount which should be allowed the town in the suit against Sandgate. The fact, that, in this latter event, the town of Pawlet was not liable to pay Leach until after the recovery against Sandgate, can make no difference. It became a present liability upon the town, upon the rendition of the services by Leach, but to be discharged *in futuro*.

We think the plaintiffs were entitled to interest on their claims after the expiration of the fifteen days from the time the notice was given to the defendants. At the expiration of such time the plaintiffs' right of action was complete, and the defendants liable to a suit. In *Brookline v. Westminster*, 4 Vt. 225, interest was allowed on the plaintiffs' claim, from the time of the demand; and no objection was made on this point of the charge. In *Houghton et al. v. Hagar*, Brayt. 133, the principle was adopted, that, in an action for goods sold and delivered, the court would direct interest to be cast from the time of demand; and there being no demand in the case, interest was allowed from the serving of the writ. The same principle is adopted in *McIlvaine v. Wilkins*, 12 N. H. 474. In *Arnott v.*

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Redfern, 3 Bing. 353, it is said, there are two principles, upon which interest is given,—1st, Where the intent of the parties, that interest should be paid, is to be collected from the terms or nature of the contract ;—2d, In cases in which the debt has been wrongfully detained from the creditor ; and in *Hillhouse v. Davis*, 1 M. & S. 109, the principle stated is, that, although interest be not due *ex contractu*, a party may be entitled to damages to the amount of the interest, for any unreasonable delay in the payment of what is due. In the case now before us, the statute, requiring fifteen days notice to be given in writing of the plaintiffs' claims is, in effect, a demand of payment at the expiration of that time ; and if not then paid, the sum then due is wrongfully detained, and the law gives damages equal to the interest for such detention. There was no error in the county court, then, in telling the jury, that, if they found for the plaintiff, they should allow interest after the fifteen days. It was quite immaterial, whether the court called it interest, or damages for the detention of the sum due. We think, then, the defendants' exceptions cannot prevail.

As the plaintiffs have also excepted, it becomes our duty to examine their exceptions.

It seems the plaintiffs claimed to recover for Dr. Edson's bill, for services rendered in doctoring the pauper pending the appeal in relation to her settlement, under an agreement, that, if the pauper's settlement should be decided to be in Sandgate, he should have a reasonable compensation ; but if found to be in Pawlet, he should have nothing. We think, that the plaintiffs should not be allowed to recover any thing for Edson's bill. If the pauper was in need of his services, it was the duty of the town of Pawlet to see that they were had,—and that upon their own responsibility. To permit the town to make a sort of a *gambling* contract with Edson, so as, in one event, to screen them from any liability, and, in another, to lay the foundation for a recovery against the town of Sandgate, we think would be unwise and against sound policy. The town of Pawlet should be governed, in making expenditures, by the utmost fairness ; and no temptation should be held out to them, to make an expenditure for this pauper at the expense of Sandgate, which it was not incumbent upon them to incur without regard to the result of the suit involving the settlement of the pauper. The town of Sandgate is a stranger

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to the transaction ; and the liability imposed upon them is a statute liability ; and if contracts like the present were sanctioned, it might tend to oppressive and reckless expenditures.

The county court were correct in not allowing the plaintiff to recover for Dr. Smith's bill. Before a town is liable to be sued, they are by the statute entitled to fifteen days' notice, in writing, of " all the charges and expenses " incurred in consequence of "the pauper's inability to be removed." As the town of Sandgate was neither party or privy to the expenditures for the support of the pauper, but the liability being imposed by statute, it is but reasonable, that the town should have notice of the *specific* expenditure ; and we think the statute requires it. The town may well wish to examine into the claim, before deciding upon its reasonableness. As Smith's bill was not named in the notice, as being included in Leach's bill ; the notice, as to that item, was insufficient.

The plaintiffs have no reason to complain of the charge of the court in relation to Leach's bill. Leach had agreed with Pierce, who was under contract with the town of Pawlet to support their poor, to keep the pauper in question at the rate of \$2,50 per week, (provided there should be no extraordinary expenses,) in case her settlement should not be adjudged to be in Sandgate. The town should not be allowed to recover more for Leach, than what he would have been entitled to, had the pauper's settlement been found not to have been in Sandgate. It was immaterial to Leach, whether the settlement of the pauper was in the one place, or the other ; and his agreement to keep the pauper at the rate specified must be evidence of what he considered it worth. Besides, the town of Sandgate should not be compelled to pay any more, than what it would have reasonably cost the town of Pawlet, had she been one of their own poor. The contract, in that event, limited by its own terms the amount of compensation.

The statute having given the town of Sandgate fifteen days to pay the bill, after notice of the expenditure, no interest should be allowed the plaintiff until a right of action accrued. There was no contract, express, or implied, to pay interest, and no wrongful detention of the money, until the expiration of the fifteen days.

The result is, that neither party can succeed in their exceptions ; and the judgment of the county court is affirmed.

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LEWIS M. WALKER v. WILLIAM A. HITCHCOCK.

Under a declaration in ejectment, in the statute form, which charges the defendant with having taken the whole profits of the premises to himself during the time laid in the declaration, the plaintiff cannot, with a view to increase his claim for *meane* profits, give evidence of such acts of trespass, as arose from the *wanton* misconduct of the defendant, and which injured the intrinsic value of the premises, without any benefit resulting therefrom to the defendant; and consequently a judgment in favor of the plaintiff, in an action of ejectment, is no bar to a subsequent action of trespass for such wanton acts of the defendant, though committed by him while the action of ejectment was still pending.

In actions of trespass to real, as well as personal property, matters in discharge of the action must be specially pleaded; and although the matter, which the defendant claims should operate as a bar to the action, may be given in evidence by the plaintiff, still the defendant cannot take advantage of it, as a bar, under the general issue. BENNETT, J.

TRESPASS quare clausum fregit. The plaintiff alleged, in his declaration, that the defendant, on the fourteenth day of June, 1841, and on divers days and times between that day and the time of commencing this suit, (which was brought to the April Term, 1844, of Rutland county court,) entered the close of the plaintiff, and broke open a messuage thereon, and broke to pieces and destroyed the doors, locks, staples, hinges and windows belonging thereto, and pulled down the shelves and counter then affixed thereto, and tore up the marble floor and steps thereof, and pulled down and destroyed the walls thereof, &c. Plea, the general issue, and trial by the court, April Term, 1845,—WILLIAMS, Ch. J., presiding.

On trial, the plaintiff, to sustain the issue upon his part, gave in evidence a copy of the record of a judgment in favor of the plaintiff against the defendant and others, in an action of ejectment for the same close and messuage, in which the plaintiff declared in the statute form, alleging the eviction to have been on the fourteenth of June, 1841, and that the defendants, from that time to the commencement of that suit had taken the “whole profits” to themselves; and it appeared, that the plaintiff recovered judgment in that suit for the seisin and possession of the premises at the April Term, 1843, of Rutland county court, and that the suit was then continued for the assessment of damages, and that at the September Term, 1843,

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the plaintiff recovered judgment for \$192,46 damages. The plaintiff also gave evidence to show that the trespasses complained of in this action were committed by the defendant in July, 1843, and that upon the assessment of damages in the action of ejectment no evidence was given as to these acts of trespass.

The county court thereupon decided, that the judgment in the action of ejectment was a bar to the present action; and that, as it appeared from the plaintiff's evidence, that that judgment was rendered subsequent to the acts of trespass complained, and that the defendant was then in possession and the plaintiff not in possession, it was not necessary for the defendant to plead the former recovery in bar, but that he might avail himself of it under the general issue; and judgment was rendered in favor of the defendant. Exceptions by plaintiff.

Thrall & Pond for plaintiff.

1. It is provided by statute,—Rev. St. c. 35, § 4,—that "in every action of ejectment, if judgment be rendered for the plaintiff, he shall recover as well his damages, as the seisin and possession of the premises." The word "*damages*," as there used, should be construed as comprehending merely those damages, which were formerly recovered by a party in an action of trespass for *mesne profits*. That action lay, at common law, against the tenant in possession of the premises, after a recovery in ejectment. The judgment in ejectment settled the title; and the action of trespass for *mesne profits* lay to recover the damages, which resulted as a consequence from the original tortious entry and *ouster* and the tortious occupancy of the premises. 3 Bl. Com. 204. Runnington on Ej. 154. *Aslin v. Parkin*, 2 Burr. 668. *Goodtitle v. Tombs*, 3 Wils. 120. 2 Phil. Ev. 314. By our statute the legislature intended to abolish the action of trespass for *mesne profits*, and authorize the plaintiffs in such actions to recover their damages,—that is, the damages included in the trespass complained of,—at the same time that they recovered possession of the premises. This is shown by the form given for the writ of ejectment. At common law the declaration in ejectment contained an allegation, that the defendant, with force and arms, entered upon the premises and ejected the plaintiff therefrom, &c. 3 Bl. Com., Appendix, No. 2. In the declaration for *mesne profits*

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the plaintiff declared, that the defendant expelled and removed him from the premises, &c., and during that time had taken and received, to the use of the defendant, all the issues and profits, &c. 2 Chit. Pl. 389. The form given in our statute substantially includes the allegations in both these actions, and nothing more. Rev. St. 485.

This court has uniformly regarded this statute as merely dispensing with the common law action of trespass for mesne profits. *Atkinson v. Burt*, 1 Aik. 329. *Burton v. Austin et al.*, 4 Vt. 105. *Smith v. Benson*, 9 Vt. 142. *Strong v. Garfield*, 10 Vt. 502. *Brinsmaid v. Mayo*, 9 Vt. 34. *Lampson v. Sutherland et al.*, 13 Vt. 315. And this being so, the judgment in the action of ejectment is no bar to an action of trespass on the freehold for injury done to the premises. 2 Chit. Pl. 390. Cow. & H. Notes to Phil. Ev., Part 2, p. 850.

2. But if the judgment was a bar to this action, it should have been specially pleaded. 1 Chit. Pl. 496. *Bird v. Randall*, 3 Burr. 1323. *Austin v. Norris*, 11 Vt. 38.

Ormsbee & Edgerton for defendant.

1. If the plaintiff had ever any cause of action for the injury complained of in his declaration, it ceased upon the recovery in the action of ejectment. The statute of this state,—Rev. St., c. 35, § 4,—supersedes the action of trespass for *mesne* profits; and as the damages in that action were recovered to the time of the recovery in ejectment, our practice has been to give damages in ejectment to the same time and for the same things. *Brinsmaid v. Mayo*, 9 Vt. 34. Story's Pl. 15, 66. *Waste*, as well as annual rent, is recoverable in the action of trespass for *mesne* profits, and, consequently, with us, in the action of ejectment. 1 Chit. Pl. 222, 225, 226. 2 Ib. 870, n. (h.) 3 Wils. 121. *Hughes v. Thomas*, 13 East 485. If the plaintiff omit to prove the waste, or any other damage, in his action of ejectment, he waives it, and cannot afterwards make it the subject of another action. *Strong v. Garfield*, 10 Vt. 502.

2. It was not necessary to plead the recovery in ejectment in the present case. 1 Stark. Ev. 206, 207. *Isaacs v. Clark*, 12 Vt. 692.

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The opinion of the court was delivered by

BENNETT, J. The county court held, that the record in the action of ejectment was a bar to this action, and that, the plaintiff having given it in evidence, it would avail the defendant, as a bar, under the general issue. We are now called upon to revise the decision of the county court.

Our statute provides, that in an action of ejectment the plaintiff shall recover, as well his damages, as the seizin and possession of the premises; though in England the plaintiff recovers only his land, and may, in a subsequent action of trespass, recover for his *mesne* profits. Whatever is derived from the *use* and *occupancy* of the land, while it is tortiously withheld from the owner, should be considered as occasioned by the trespass included in the ejectment, and may and indeed *must be*, under our statute, included in the damages recovered in the action of ejectment. If, in such case, but nominal damages are assessed, still there can be no second action to recover the *mesne* profits.

In the present suit, the plaintiff does not seek to recover for any thing derived from the *use* of the land, but for such wanton acts of trespass, as would, in fact, constitute waste, and would not, even with the most liberal use of language, come under the idea of *mesne* profits. In England, in the action of trespass for *mesne* profits, the plaintiff will not be entitled to recover for any injury done to the premises in consequence of the misconduct of the defendant, unless such facts are specially alleged in the declaration. 2. Steph. N. P. 1494. The form of the declaration, given by our statute, which the plaintiff has adopted in this case, charges the defendant with having *expelled* the plaintiff from the premises, *taking the whole profits to himself*. Upon such a declaration, the plaintiff should not be allowed to give in evidence, on the trial of the ejectment, such acts of trespass, as arose from the wanton misconduct of the defendant, with a view to increase his claim for *mesne* profits, and which injured the intrinsic value of the premises, without any benefit resulting from them to the defendant. The same reason, which requires such facts to be specially alleged in a declaration in trespass for *mesne* profits at the common law, would equally apply to a declaration in ejectment under our statute, in a case in which damages are claimed to be recovered for such acts. Without it, the defendant

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would be equally subject to surprise in the one case, as in the other. We apprehend, that it was not the intention of the legislature to bar any claim for damages, by a proceeding in ejectment, which could not appropriately be given in evidence under the statute form of the declaration,—simply charging the defendant *with the taking of the whole of the profits to himself.*

The plaintiff, in this case, had judgment to recover the seisin and possession of the premises, before the trespasses complained of had been committed. All that remained to be done was, to assess the damages. We think, upon principle, that the damages must have been confined to such claims, as would come under the denomination of *mesne profits.*

The only wrong, charged in the declaration to the defendant, is the eviction of the plaintiff and *the taking of the entire profits to his own use.* It is difficult to see, how the proceedings in ejectment can bar a right of action for a wanton destruction of the premises. The term *damages*, in the statute, should be confined to the subject matter, then under consideration; which was the providing a remedy for the eviction and the damages consequent upon it. The damages now sued for cannot be said to be consequent upon the eviction, but arose from subsequent tortious acts, destructive of the premises, and disconnected with the original trespass, and with the cause of action adjudicated upon in the first suit.

In this view, the plaintiff's present claim can not be barred by the former judgment. I am not aware, that this view of the subject is opposed to principle, or to any adjudged case; and it is necessary, in order to protect the rights of the present parties.

In regard to the manner, in which the defendant should have availed himself of the record, in case it constituted a bar to this action, it is not necessary to decide. It may, however, with safety be said, that, in actions for trespass to real as well as personal property, matters in discharge of the action must be specially pleaded,—as in the case of a release, or a former recovery. 1 Chit. Pl. 496. *Bird v. Randall*, 3 Burr. 1353. This, as a general rule of law, is admitted; but it is claimed, that, as the plaintiff gave the record in evidence to show a title in himself to the lands described in the present declaration, the defendant may claim the benefit of such evidence as a bar to the action, without pleading it. No authority has been

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produced, to show, that, in such a case, the special plea may be dispensed with; and I can discover no reason, why it should be. The plea of not guilty is, in law, simply a denial of the facts stated in the declaration; and every cause is to be tried and decided upon the issue joined between the parties; and the evidence is to be received and applied only as it bears upon the issue which the parties have seen fit to join. I think the case of *Allen v. Parkhurst et al.*, 10 Vt. 557, is conclusive of this question;—but still, as we hold that the former recovery could have been no bar, if properly pleaded, we have no occasion to decide the question now under consideration.

Whether the plaintiff had such a possession, as would enable him to maintain this action, is quite another question. It might, perhaps, be claimed, that if the plaintiff had been let into possession, under his judgment, by the consent of the defendant, or had been put into possession under a writ of possession, he should be considered as in of his first estate. The decision of the court below upon the effect of the record put an end to the case, and rendered all farther showing as to possession of no avail, if necessary to entitle the plaintiff to a recovery.

We think the county court erred, in the effect which they gave to the record in the action of ejectment. The result is, the judgment of the county court is reversed, and the cause remanded for trial.

**CALEB PARIS v. SAVID BARTLETT AND ABNER BARTLETT.**

In an action of ejectment against a tenant in possession of land, the writ will not abate, if the landlord is not joined as a defendant, in a case in which the tenancy is by parol and is unknown to the plaintiff.

In this case, which was an action of ejectment, commenced in 1844, the defendants pleaded in abatement, that one M. was owner and landlord of the premises, and that the defendants were his tenants; and issue was joined thereon;—

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and it was held, that evidence, that M. recovered judgment in an action of ejectment for the same premises, in 1826, against one of the defendants, and that the defendants occupied the premises from that time until 1840, as tenants of M., but not under a written lease, and that the other defendant and a third person executed a mortgage of the premises to M. upon a contract for the purchase of the premises, and that in 1842 M. recovered a judgment against the mortgagors in an action of ejectment founded upon the mortgage, and that from that time until the commencement of this suit the premises had been occupied by the defendants with the consent of M., but without a written lease, and that they had paid rent to him therefor,—it not appearing that the plaintiff knew of such payment of rent, or knew that M. was landlord,—had no tendency to sustain the issue, on the part of the defendants, upon the plea in abatement.

EJECTMENT for land in Danby. The defendants pleaded in abatement, that one James McDaniels, of Rutland, was the owner and landlord of the demanded premises, and that the defendants were his tenants, and that so McDaniels ought to have been joined as defendant in the suit ;—and upon this plea issue was joined. Trial by jury, September Term, 1845.—WILLIAMS, Ch. J., presiding.

On trial the defendants gave in evidence the record of a judgment in favor of McDaniels against the defendant Savid Bartlett, in an action of ejectment for the same premises described in the declaration in this suit, rendered at the April Term, 1826, of Rutland county court;—also evidence tending to prove, that the defendants occupied the premises, as tenants of McDaniels, from that time until February 11, 1840, and paid rent to him, but not under a written lease;—also a mortgage deed of the same premises, executed by the defendant Abner Bartlett and one Marcus Bartlett to McDaniels, to secure the amount agreed to be paid by them upon a contract for the purchase of the premises;—also the record of a judgment in favor of McDaniels against Abner Bartlett and Marcus Bartlett, in an action of ejectment founded upon the mortgage, rendered at the April Term, 1842, of Rutland county court;—also evidence tending to prove, that since that time the defendants had occupied the premises by the express consent of McDaniels, and had paid rent to him therefor, although there was no written lease of the premises given by McDaniels to them;—but there was no evidence tending to prove, that the plaintiff knew of the payment of such rent, or knew that McDaniels was in any way landlord.

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The court instructed the jury, that this evidence did not tend to sustain the issue on the part of the defendants; and a verdict was returned in favor of the plaintiff. Exceptions by defendants.

Thrall & Pond for defendants.

The statute,—Rev. St. c. 35, § 1,—enacts, that the action of ejectment “shall, in all cases, be brought as well against the landlord, if any there be, as against the tenant in possession of the premises, and, if otherwise brought, the same shall, on motion, be abated.” The tenancy contemplated by this statute need not be a tenancy created by deed, and when this relation appears from such deed upon the record; but it is “in all cases,” where a tenancy exists, that the landlord must be joined. *Wallace v. Farnsworth*, 2 Tyl. 294. *Warner v. Pate et al.*, 5 Vt. 166. If a debtor remains in possession of land, after six months subsequent to the levy of an execution upon the land, he is, by operation of law, made the tenant of the creditor; so a mortgagor, after condition broken, is tenant of the mortgagee, or after decree of foreclosure and the expiration of the time for redemption. *Aldis, Ex'r, v. Burdick*, 8 Vt. 21. *Hathaway v. Phelps*, 2 Aik. 84. *Ex'r of Tucker v. Keeler et al.*, 4 Vt. 161. *Wilson v. Hooper*, 13 Vt. 653. The court below assumed, that express notice to the plaintiff of this tenancy must be shown, before he is required to join the landlord in the action. We contend, that the records introduced furnished sufficient evidence of notice. *Warner v. Pate et al.*, 5 Vt. 166. *Hedges et al. v. Gates*, 9 Vt. 178. *May v. Albee*, Circ. Ct., 1830, cited in Washburn's Dig. 324, sec. 77. It was unnecessary for the plaintiff to know anything in relation to the terms of the tenancy. *Hurd v. Tuttle et al.*, 2 D. Ch. 43.

G. W. Harmon, for plaintiff, relied upon *Wallace v. Farnsworth*, 2 Tyl. 294, and *Brush v. Cook*, Brayt. 89, as decisive of this case.

The opinion of the court was delivered by

BENNETT, J. The plea in abatement alleges, that James McDaniels was the owner and landlord of the premises in question, and that the defendants were his tenants, and that he (McDaniels) was not joined in the suit. The replication traverses the allegation, that

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the defendants were the tenants of McDaniels. The county court, after the evidence was put in, held that the defendants had failed to sustain their plea in abatement, and so instructed the jury. We are now called upon to revise this ruling of the county court.

In order to ascertain in regard to the correctness of the ruling of the court below, it is necessary to examine carefully, to see what the testimony was,—which seems to have been put in without objection. It is difficult to see how the recovery of the premises in the action of ejectment by McDaniels against Savid Bartlett, (one of these defendants,) in 1826, can in any way tend to establish a tenancy in these defendants, of which the plaintiff was bound, at his peril, to take notice. Under our statute, it is true, the recovery is *conclusive*, as to the title, against Savid Bartlett; but it has no tendency to prove a *tenancy*,—at least such a one, as our statute contemplates, when it enacts, “that all actions of ejectment shall be brought, as well against the landlord, if any there be, as against the tenant in possession.”

The statute of 1797 was the same with our present statute. At an early day that statute received a construction, which has ever since been followed. In *Wallace v. Farnsworth*, 2 Tyl. 295, it was held, that the plaintiff was not obliged to join a landlord with the tenant in possession, who held by a *parol* lease, or by a written unrecorded lease, unless it was shown, that the plaintiff had, at the time of the commencement of the suit, notice of such written lease. In *Brush v. Cook*, Brayt. 89, (1819,) it was held, that a landlord is not concluded by a judgment in ejectment against his tenant by a *parol* lease, the landlord not being joined in the suit. In that case it was said, that the plaintiff's writ will not abate, if the landlord is not joined in the suit, in a case in which the tenancy is by *parol*, and unknown to the plaintiff. This, we think, has been the uniform construction of the statute, and is the only reasonable one. No doubt, a *parol* tenancy is sufficient to render the landlord liable to be joined in the suit against the tenant; and in the circuit court of the United States it has been held, that proof of an outstanding mortgage from the tenant in possession to his co-defendant was sufficient to render the latter liable to be sued as landlord. See *May v. Albee et al.*, cited in Washburn's Dig. 324, sec. 77. I understand the same question has been decided in the same way in the

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circuit court, within some two years. I am not aware, that this question has been before the state courts.

Though the circuit court have decided, that the *mortgagee* may be joined with the *mortgager* in possession, yet it by no means follows, that the same court would hold, that he *must be* joined, to save an abatement. The mortgage, before entry and foreclosure, is deemed but a pledge, a charge, or *lien* upon the estate, subject to which the legal rights and remedies of others may be sought, asserted and enforced in the same manner, as if no such mortgage existed. It is true, that the mortgagee is taken as the owner of the land in fee, as against the mortgagor and all persons claiming under him; yet the mortgagor, as to all persons except the mortgagee and those claiming under him, is to be considered, so long as he remains in possession, as the owner.

It is quite apparent, we think, that the mortgage deed, which is made a part of the case, from Abner Bartlett (one of the defendants) and Marcus Bartlett to McDaniels cannot, of itself, create such a tenancy in these defendants, as to render it necessary to join McDaniels in the suit. Savid Bartlett, the other defendant, is in no way connected with the mortgage; and the plaintiff, who stands as a stranger to it, may enforce any rights, which he has against the mortgagors, in the same manner, as if no mortgage existed, subject to the mortgagee's rights, if paramount to those of the plaintiff.

So the bare recovery by McDaniels, in the action of ejectment against Marcus Bartlett and Abner Bartlett, in 1842, can have no effect to create a tenancy in the defendants under McDaniels, which the plaintiff was bound to notice. The evidence, which went to show that the premises, since that time, had been occupied by the defendants with the express consent of McDaniels, and that they had paid him rent, was but evidence of a *parol tenancy*. Besides, the case expressly finds, that there was no written lease from McDaniels to the defendants, and no evidence tending to show that the plaintiff knew of the payment of the rent to McDaniels, or knew that he was in any way landlord.

The evidence, which seems to have been put into the case to show that the defendants occupied under McDaniels from 1826 to February 11, 1840, is entirely out of the case. This suit was not

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commenced, until long after such tenancy was ended. Besides, while it existed, it was but a parol tenancy.

On the whole, then, we think the county court were right, in holding that the testimony did not show such a tenancy, as to render it incumbent upon the plaintiff to have joined McDaniels in the suit,—or, in other words, that it did not maintain the issue on the part of the defendants.

The judgment of the county court is affirmed.

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**STRONG & BUCK v. ELIAS MITCHELL, and JAMES T. PHELPS,
Trustee.**

Where one summoned as trustee had, previous to the service of the trustee process upon him, signed a promissory note as co-surety with the principal defendant, and he paid the note after the trustee process was served upon him, it was held, that he was entitled to deduct from the funds in his hands one half of the amount so paid,—being the amount for which he was entitled to call upon the principal defendant for contribution as co-surety.

But he was not allowed to deduct from the funds in his hands the amount of a note, due from the principal defendant to a third person, which he had promised to pay for the principal defendant prior to the service of the trustee process, but which promise was void by the statute of frauds.

TRUSTEE PROCESS. The trustee disclosed, that he was indebted to the principal defendant upon certain promissory notes, and also that he had a quantity of manganese, belonging to the principal defendant; and he claimed to be allowed for certain offsets. And among other things the trustee disclosed, that, previous to the service of the trustee process upon him, he had signed, as co-surety with the principal defendant, two promissory notes to one Cheever, and that he had paid the whole amount due thereon, after the trustee process was served upon him. He also disclosed, that he was authorized to pay some of the debts of the principal defendant out of the funds

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in his hands, and that, prior to the service of the trustee process upon him, he had promised, verbally, to pay to one Winslow a note which the principal defendant had executed to one Pinney, or bearer, as soon as he could raise money from the sale of the property in his hands. And the trustee claimed, that, in addition to his other offsets, in reference to which there was no controversy, he should be allowed to retain, from the funds in his hands, the amount of the Pinney note, and one half of the amount which he had paid upon the Cheever notes. But the county court decided, September Term, 1844,—WILLIAMS, Ch. J., presiding,—that he could not be allowed to retain either of those sums;—to which decision the trustee excepted.

S. H. Hedges for trustee.

The amount paid by the trustee on the Cheever notes should have been deducted from the sum he owed to the defendant.

1. The general rule in foreign attachment is, that the trustee “is to be allowed all his demands against the principal, of which he could avail himself in any form of action, or any mode of proceeding, between himself and his principal.” *Hathaway v. Russell*, 16 Mass. 473. *Smith v. Stearns*, 19 Pick, 20. Accordingly he has been allowed payments made by him, after the commencement of the suit, as surety for the principal. *Boston Type and Ster. Co. v. Mortimer*, 7 Pick. 166. Had the defendant sued this trustee on his notes, he could have availed himself of this payment in various ways.

2. Our statute contemplates the state of the accounts between the defendant and his trustee, when the action is tried. Had Mitchell paid the Cheever notes, after the commencement of this suit, he would have had a clear demand against Phelps for a contribution, on the strength of which Phelps would have been adjudged his trustee. It is but justice to give Phelps the benefit of a similar claim against Mitchell.

3. The nature of the action for a contribution shows, that the claim is founded on an implied contract. *Deering v. Winchelsea*, 2 B. & P. 270. It comes strictly within the letter of the statute,—Rev. St. 194, § 35,—which is not confined to contracts entered into before the commencement of the action.

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Briggs & Williams for plaintiffs.

The plaintiffs' claim is for the goods and credits of the principal defendant in the hands of the trustee at the time of the service of the writ upon him. Rev. St. c. 29, § 4. Section five specifies all payments or liabilities of the trustee after this time, for which he will be protected. The thirty fifth section must be construed in connection with sections four and five,—which will limit the demands, which the trustee is allowed to retain, to such as existed at the commencement of the suit. The trustee's claim, upon the Cheever notes, did not accrue until after that time. The thirty fifth section gives to the trustee the same rights, which he would have had under the statute in relation to offsets, if a suit had been commenced against him by the principal defendant. In such an action, commenced at the time of the commencement of this suit, he could not have set off the amount subsequently paid by him upon the Cheever notes. Rev. St. c. 34, § 4. *Carpenter v. Coit*, 1 D. Ch. 88. If the notes, upon which the trustee was adjudged chargeable, had been assigned by the principal defendant to the plaintiff at the time of the service of this writ, the trustee would have been liable for their full amount. The object and intent of our attachment and trustee laws is, to give to creditors, by means of legal proceedings, the same rights and security upon the property of the debtor, which the debtor might voluntarily give them.

The opinion of the court was delivered by

BENNETT, J. The thirty-fifth section of the trustee act provides, "that the trustee shall be allowed to deduct out of the credits in his hands all his demands, founded on contract, express, or implied, against the principal defendant; and he shall be adjudged trustee only for the balance." This section does not require the indebtedness absolutely to exist at the time, when the trustee suit was commenced. If, before final disclosure, the principal defendant becomes indebted to the trustee, in consequence of his being compelled to pay a sum of money for the use of the principal debtor, by reason of any liabilities assumed prior to the service of the trustee process, it would seem to be consistent with the object and views of the legislature, and the general tenor of the statute, to allow the

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trustee to offset such demand and be chargeable only for the balance, if any.

In this case the trustee had, as *co-surety* with the principal debtor, become absolutely holden to Cheever before he was summoned as trustee, and had no means, by which he could discharge himself, without payment. When the trustee had paid the notes, his right of action was complete, against his *co-surety*, for one moiety of the sum so paid. In *Ward v. Leland et al.*, 1 Metc. 387, Chief Justice SHAW says, "The right of action, as between co-sureties, for contribution, grows out of the original implied agreement, that, if one shall be compelled to pay the whole, or a disproportionate part, of the debt, the other will pay such a sum, as will make the common burden equal;"—though the right of action accrues only from the time of payment. See also *Slothoff v. Dunham's, Ex'rs*, 4 Harr. 182. So a surety has a right of action against the principal, upon an implied contract in law, whenever he has been compelled to pay money on account of his assumed liability; yet the right of action in this case is also from the time of such payment. See *Davies v. Humphrey*, 6 Mees. & Wels. 167.

I have no doubt, the foundation of contribution is a fixed principle of *equality*, and that the right to contribution arises, in a certain sense, out of principles of equity, independant of contract. This is pre-eminently true in the case of *Peter v. Rich*, 1 Chanc. Rep. 85; in which it was held, that two out of three sureties were bound to pay in moieties, the third being insolvent. This is said to be the principle, which prevails in such a case, only in chancery. If, however, the surety, who pays the whole debt, goes against any other one of the sureties, for his aliquot proportion, only, of the money paid, he may have redress at law. In such a case, I conceive, as is said by Ch. J. SHAW, in *Wood-v. Leland et al.*, the right may well be said to grow out of an original implied agreement between the sureties, when they became such. The plaintiff ought not to stand in a better condition than the principal debtor, and be enabled to call out of the hands of the trustee money which the principal debtor could not do.

Though the trustee had no right of offset against the principal debtor, at the time when the suit was commenced, yet it was complete when the disclosure was filed; and if the principal debtor had

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sued the trustee before the payment of the Cheever notes, the trustee might have brought his cross action ; and the court, if justice required it, would keep the causes together, so that the judgments might be offset.

In regard to the Pinney note, we think the trustee should not be allowed to retain any thing on that account. His undertaking to pay the note, not being in writing, was within the statute of frauds and not binding; and if he had paid it after the service of the trustee process, it might well be regarded as a voluntary payment. *Hazeltine v. Page*, 4 Vt. 49. In the present case, however, no payment has in fact been made.

The result, then, is, that the judgment of the county court is reversed, and judgment rendered, that the trustee is chargeable for the sums of money and the manganese, as found by the county court,—adding to the amount deducted by that court one half of the sum paid to take up the Cheever notes, and the interest on the same :—The clerk will make the computation accordingly.

INDEX.

ABATEMENT, *See Actions Penal* 3, 4; *Book Account* 13, 14; *EJECTMENT* 3, 4; *PROCESS* 6.

ACCOUNT.

1. If, in an action of account between tenants in common of land, the interest of each is not sufficiently set forth in the declaration, or if the fact of the receipt, by the defendant, of an undue proportion of the rents and profits is not properly stated, the proper course on the part of the defendant is to demur. *Strong v. Richardson*, 194.
2. An allegation in the declaration, in such case, that the plaintiff and defendant were "joint and equal owners" of the land described, would probably be insufficient, on demurrer, as a statement of the tenancy; and an averment, that the defendant had the charge and administration of the land, and the possession thereof, and cut, sold and used timber to a large amount, and of a large value, "to render account for the same" to the plaintiff, is an insufficient statement of the reception, by the defendant, of an *undue proportion* of the profits. *DAVIS, J. Ib.*
3. But where the defendant, instead of demurring to such declaration, pleaded in bar, that he was not the bailiff of the plaintiff for the period claimed, and that the parties were not the joint and equal owners of the land in question, and that the defendant was not bound to account for whatever timber he cut and removed, adopting negatively the words of the declaration, and the issue joined thereon was found for the plaintiff, and judgment to account was thereupon rendered, it was held, that the defendant was precluded from taking advantage of the defects in the declaration, and that the defendant must be held liable to account. *Ib.*
4. In an action of account between partners, in which the plaintiff claims that the defendant account for money received by him from the avails of the business during the partnership, an agreement, executed by the plaintiff and delivered to the defendant, previous to the commencement of the action, in which it is recited, that the defendant has relinquished to the plaintiff all claim to the demands due to the firm and to the stock of the firm, in consideration of which the plaintiff promises to pay the debts due from the firm and to indemnify the defendant against them, has no legal tendency

cy to sustain a plea by the defendant, that he has fully accounted for the money claimed in the declaration. *Woodward v. Francis*, 434.

See DECLARATION IN OFFSET 1, 2.

ACTION, *See ASSIGNMENT 1, 3; CONTRACT 1; CONTRIBUTION 1, 2; GUARANTY 2; PROMISSORY NOTES 8, 9.*

ACTION ON THE CASE.

1. Trespass on the case, for any mere non-feasance of the deputy, will only lie against the sheriff. *Abbott v. Kimball et al.*, 551.
2. In order to sustain an action for an excessive attachment of property upon a writ, the plaintiff must allege and prove much the same, that he would in a suit for a malicious action,—that is, want of probable cause and malice express; —and the attaching creditor will ordinarily be the only person liable to such action. *Ib.*

See JURISDICTION 4; PROCESS 4.

ACTIONS PENAL.

1. The statute,—Rev. St., c. 106, § 16,—which provides, that, if an officer shall receive any greater fees than provided for by law, he shall pay to the person aggrieved ten dollars for each dollar excess of fees so received, and in the same proportion for a greater or less sum, is a penal statute, and, as such, is embraced in section six of chapter fifty seven of the Revised Statutes, limiting the time, within which actions may be brought, to four years; and, consequently, an action, brought by a person aggrieved by the taking of illegal fees, for the purpose of recovering the penalty, comes within the provision of section nine of chapter fifty seven of the Revised Statutes, requiring a minute to be made upon the writ of the day, month and year when the same was signed. *Whealock v. Sears*, 559.
2. The minute required by that statute,—Rev. St. c. 57, § 9,—must be made at the time the writ is signed;—if made subsequently it is insufficient. *Ib.*
3. But the objection, founded upon the want of such minute, like any ordinary matter in abatement, if not insisted upon at the earliest opportunity, is waived. If the action is commenced before a justice of the peace, the motion to dismiss, founded upon the want of such minute, must be made at the return day of the writ. *Ib.*
4. If such objection is not taken at the return day of the writ, it is waived, although the parties, after the writ was served, agreed to substitute another day for the return day, but without any express reservation of the right to insist upon this dilatory matter. *Ib.*
5. In a *qui tam* action, brought to recover the penalty given by the statute for receiving a fraudulent conveyance, the plaintiff cannot recover without showing that the deed was made and received with a fraudulent intent, which existed in both parties. If the defendant received the deed in good faith, for the purpose of securing a debt due to him, he would not thereby subject himself to the penalty. *Smith q. t. v. Kinne*, 564.

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6. Where it was alleged in the declaration, in such case, that the defendant received the deed fraudulently, and it appeared that he had subsequently conveyed the land to a third person, at the request of the grantors, and the court instructed the jury, that, if the intent of the defendant in receiving the deed was not fraudulent, still if the intent of the grantors, in conveying to him, was fraudulent, and he was aware of that intent, his conveyance of the land to the third person shifted the burden of proof upon him, and rendered it necessary for him to prove that he executed that deed in good faith and with no fraudulent purpose, and that, upon the failure of such proof, he must be presumed to have conveyed away the land with intent to defraud the plaintiff, it was held, that the intent, with which the conveyance to the third person was made, was not within the issue, and that the instructions to the jury were erroneous. *Ib.*

ADMINISTRATORS, *See Ex'rs & Adm'rs.*

ADVERSE POSSESSION.

1. Whether one, who receives the possession of land from another, is estopped from claiming title to it must depend upon the inquiry, whether the claim attempted to be set up is consistent with the contract under which the possession was taken. *Ripley v. Yale*, 156.
2. Where one enters into possession of land under a parol contract of purchase, and pays a portion of the purchase money in advance, and is, by the terms of the contract, to receive a deed of the premises upon furnishing certain required security for the remainder of the purchase money, and the security is offered, but the vendor refuses to deed, there is nothing in the nature of the contract, which would preclude the purchaser from claiming to hold the premises adverse to the vendor; and such possession, if open and exclusive, accompanied by claim of title, will avoid a deed of the premises, executed by the vendor to a third person subsequent to the performance of the contract on the part of the purchaser. *Ib.*
3. And even if the purchaser could be considered as tenant at will to the vendor, until the completion of the contract, yet if he offer to perform the contract on his part, and the vendor refuse to deed, and the purchaser thereupon give notice to the vendor that he shall "hold on to the land," the possession of the purchaser becomes adverse and will avoid a deed subsequently executed by the vendor to a third person.

AFFIDAVIT, *See EXCEPTIONS 1.*

AGENT, *See CORPORATION 1.*

* **AGREEMENT,** *See CONTRACT.*

ALIMONY, *See HUSBAND & WIFE.*

AMENDMENT, *See CHANCERY 26, 28; HIGHWAYS 6; PROCESS 12.*

ANSWER IN CHANCERY, *See CHANCERY.*

APPEAL.

1. By the Revised Statutes it was provided, that in certain cases a judgment rendered by a justice of the peace might be vacated, on petition to the county court at the first or second stated term after the rendition of the judgment, and the case be proceeded with as though entered by appeal. By the statute of Nov. 1, 1848, the limitation was repealed, and it was provided, that no such petition should be sustained, "unless brought within two years next after the justice's judgment." And it was held, that it was not the intention of the legislature, that the statute of 1848 should be retrospective in its operation, so as to allow a petition to be sustained in a case in which, before the enactment of the statute, the limitation provided in the Revised Statutes had expired. *Briggs v. Hubbard*, 86.

See CHANCERY 49; *COUNTY COURT* 1, 2; *JURISDICTION* 1; *PROBATE COURT* 1.

ARBITRATION.

1. An award is not void for uncertainty, which provides that one of the parties shall pay the "taxable costs" of a suit which had been pending in court. *Wright v. Smith*, 110.
2. But, to entitle the plaintiff to recover upon such an award, he must aver in his declaration that the *taxable costs* amounted to a certain specified sum, of which the defendant had *notice* before suit brought; and if this averment is omitted, the declaration is bad upon demurrer. *Ib.*
3. Under the Revised Statutes the selectmen of a town have power to submit to arbitration any such claims against the town, as they are, by the statute, authorized to audit and adjust; and the town will be bound by an award made in pursuance of such submission. *Dix v. Dummerston*, 262.
4. In this case a claim was preferred against a town for building a bridge, and the selectmen of the town agreed with the claimant, by writing under seal, to submit the matter to arbitration; and it was held, that the town was bound by the award made in pursuance of such submission. *Ib.*

See HIGHWAYS 2.

ARREST OF JUDGMENT, *See CRIMINAL LAW* 4.ASSAULT AND BATTERY, *See PLEADING* 2, 7.

ASSIGNMENT.

1. Where the defendants made a general assignment of their property for the benefit of their creditors, and some of the creditors, among whom was the plaintiff, agreed, in writing, to receive the dividends which might accrue to them "after a faithful accounting by the assignees, and await the same," and it appeared, that, prior to the commencement of this suit, the surviving assignee had notified the creditors, that he was ready to pay a dividend of twenty five *per cent.* upon their claims, and that that was all he could pay, and more than they would be entitled to receive upon a strict accounting, and it did not appear upon what basis the dividend was thus declared, nor that there was any fraud,

nor that any more was retained by the assignee than a reasonable compensation for his services and expenses, it was held, that this was substantially an *accounting*, within the meaning of the agreement signed by the plaintiff, and that the plaintiff was entitled to sustain an action upon his original claim against the assignors. *Foster v. Deming et al.* 318.

2. And it was also held, that it made no difference, in such case, that the plaintiff refused, before the commencement of this suit, to receive the dividend thus declared by the assignee, it appearing that he received it after the suit was commenced, and that it was deducted from the amount of his claim in making up the judgment. *Ib.*
3. And it was also held, that the temporary bar of the plaintiff's right to sue, created by the agreement signed by him, was removed by an unnecessary and unreasonable delay, on the part of the assignee, to render his account and declare a dividend. *Ib.*

See CONTRACT 3-5; TRUSTEE PROCESS 12.

ASSOCIATION, See CORPORATION 2-5.

ASSUMPSIT.

1. A writing in these words,—“For value received of Cummings & Manning, or order, thirty dollars and eighty-three cents on demand and interest annually,” signed by the defendant, is competent and sufficient evidence under a count for money had and received. *Cummings et al. v. Gassett*, 308.
2. Where usury is included in mortgage notes, and a bill of foreclosure is brought, the defence, based upon the usury, must be made in that suit, or the decree will conclude the right. But if the *original contract*, evidenced by the mortgage notes, was not usurious, the *subsequent* payment of usury upon it has no legal connection with it; and the amount so paid may be recovered back in an action for money had and received, notwithstanding a decree of foreclosure may have been obtained, without any allowance for the usury so paid. *Grow v. Alber*, 540.
3. The general rule is, that, for money accruing due under the provisions of a statute, the action of assumpsit may be supported, unless another remedy is expressly given. *Pauslet v. Sandgate*, 621.
4. Assumpsit will lie upon the statute,—Rev. St. c. 16, § 6,—which provides, that where an order of removal is made, and the pauper cannot be removed on account of sickness, the town procuring the order to be made shall support the pauper until he can be removed, and may recover the expenses of sickness and removal from the town to which the pauper was ordered to remove, if such town shall neglect to make payment for fifteen days after notice. *Ib.*

See SHERIFF 5.

ATTACHMENT.

1. The liability of the recipient of property attached, upon his receipt, depends upon the liability of the officer who took the receipt. If the execu-

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- tion is delivered to another officer, and the property is demanded of the attaching officer in season to charge him, it is not necessary that it should also be demanded of the receptor within the thirty days. *Allen v. Cartt et al.*, 65.
2. Where the term of court, at which a party recovers final judgment, ends on Saturday, Monday is the first day on which the party is entitled to take out execution; and that day is to be excluded in the computation of the thirty days, within which property, attached on the original writ, must be demanded of the attaching officer by the officer holding the execution, in order to charge the property. *Ib.*
3. When a portion of the property attached and receipted has been withdrawn from the custody of the receptor in such manner as to discharge his liability so far, and the value of the property receipted is expressed in the receipt at one entire sum, the damages, in an action upon the receipt, are to be determined by assuming the value of the whole property receipted to be the sum specified in the receipt, and then ascertaining the just proportion, at that assumed value, which the property retained by the receptor would bear to the property for which he is not liable. *Ib.*
4. Property, purchased by a trustee with the trust funds, and held by him in his own name, is not subject to attachment and sale by his creditors, unless they are *bona fide* creditors without notice of the trust. *Porter et al. v. Bank of Rutland et al.*, 410.
5. *Quare*, Whether notice of the trust, received by the attaching creditors subsequent to the attachment, but before levy, should affect their rights acquired by the attachment, if they had no notice of the trust at the time the attachment was made? *Ib.*
6. Where property has been attached by one officer, and is in his custody, a return by another officer, who also holds a writ of attachment against the owner of the property, that he has attached the same property, subject to the first attachment,—still leaving the property in the possession of the first attaching officer,—will create no lien upon the property; and it makes no difference, that the officer making the first attachment was one of the plaintiffs in the second writ, and so could not serve it,—nor that it was at the time agreed between the two officers, that the writ held by the second officer should stand in any particular order of priority. *Burroughs v. Wright et al.*, 510.
7. An attachment cannot exist without custody, or possession, either by the officer, or by his servant. *Ib.*
8. Where an officer attaches personal property upon three writs of attachment, and at the same time levies an execution upon the same property, subject to the attachment upon the three writs, and takes the property into his possession, and the executions obtained upon the three writs first served are placed in the hands of another officer, leaving the fourth execution in the hands of the first officer, this gives such other officer no right to take the property from the possession of the first officer. *Ib.*

9. And it makes no difference, in such case, that the second officer, upon receiving the executions, demanded the property of the first officer, and he consented that it might be taken, if such consent were in fact revoked, before it was acted upon by the second officer. *Ib.*
10. And if, after such consent is revoked, the second officer take the property into his possession, he has no right to retain it, as against the first officer; and the first officer will not become a trespasser by the retaking the property, to be disposed of upon the execution still retained by him;—nor will he become a trespasser, as to the second officer, by any subsequent irregularity in his proceedings upon that execution. *Ib.*
11. The exemption from attachment and levy of execution, contained in chap. 42, sec. 18, of the Revised Statutes, of “such military arms and accoutrements as the debtor is required by law to furnish,” is of a temporary character, as applied to the individual, to continue so long as the debtor is bound by law to furnish them; and when the obligation ceases, the exemption in the particular case ceases. *Owen v. Gray & Tr.,* 514.
12. Where it appeared from the disclosure of a trustee, that he had in his possession certain military accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously absconded from the state, it was held, that he had ceased to be an officer, in consequence of his removal from the state, and that he was no longer under obligation to furnish these military accoutrements, and that consequently the statute exemption, as to him, had ceased, and that the trustee should be held chargeable for the articles. *Ib.*
13. Where property, attached upon a writ, is bailed to a receiver, a judgment, recovered by the creditor against the receiver, upon the receipt, becomes a mere dead letter upon the payment of the debt to the creditor. Such judgment is merely collateral to the debt, and is for the benefit and security of the sheriff, and ceases to have force, when his liability to the debtor and creditor is discharged. *Paddock v. Palmer et al.,* 581.

See CHANCERY 52-54; DEED 16; EVIDENCE 3; EXECUTION 6; SALE 5, 6; SHERIFF 4-10.

ATTORNEY.

1. If an attorney make a writ and indorse his name upon it as attorney for the plaintiff, and also sign the writ as justice of the peace, and, for want of a proper officer seasonably to be had, direct the writ to an indifferent person by whom it is served, the process will abate. *Ingraham v. Leland et al.,* 304.
2. And if the attorney, who makes the writ, signs it as justice of the peace and takes a recognizance for costs, this will be a judicial act, which will render the process abatable. *DAVIS, J.* *Ib.*

See Book ACCOUNT 9.

AUDITA QUERELA.

1. *Audita querela* will lie to set aside an execution wrongfully issued against the body of the execution debtor. *Sawyer et al. v. Vilas,* 43.

2. A judgment is a contract, within the meaning of section sixty three of chapter twenty eight of the Revised Statutes; and an execution, obtained in an action of debt upon a judgment rendered since the first day of January, A. D. 1839, cannot legally issue against the body of the debtor. *Ib.*
3. Where *audita querela* was brought to set aside an execution in such case, and the case was tried in the court below upon a statement of facts, agreed to by the parties, and the original writ and execution against the complainants were referred to and made part of the case, wherein the complainants were described as residing in this State, it was held, that this was sufficient to show, in the absence of all rebutting testimony, that they were resident citizens of the State, within the meaning of the statute, at the time the execution issued. *Ib.*
4. If the defendant in the *audita querela* would claim, that the execution issued upon an affidavit, within the *proviso* to the statute, he must show that fact affirmatively. *Ib.*
5. But where one summoned as a trustee was adjudged chargeable, subsequent to January 1, 1839, by reason of a note which he had executed to the principal debtor prior to that date, and the plaintiff in the trustee process commenced an action on the case against the trustee, pursuant to the statute, to recover from him the amount for which he was held chargeable, it was held, that the execution obtained in the latter suit was properly issued against the body of the trustee. *Clark v. Trowbridge et al.*, Franklin Co., 1846, cited by BENNETT, J. *Ib.*
6. An execution issued by a justice of the peace, which is renewed by erasing the date and inserting a new date, after it has been delivered to an officer for collection, but before service has been made, and within its life, is not thereby rendered absolutely void, so that it may be set aside on *audita querela*. *Sawyer v. Doane*, 598.

AUDITOR, *See Book Account.*

AUTHORIZED OFFICER, *See Process 7-11.*

AWARD, *See Arbitration.*

BAIL, *See Recognizance.*

BASTARD, *See Poor 4, 5.*

BETTERMENTS.

1. Where the owner of land has recovered judgment in an action of ejectment against one who entered upon the land subsequent to the enactment of the Revised Statutes, the person so entering cannot recover for betterments put by him upon the land, notwithstanding he may have entered and occupied in good faith, supposing that he had a good title in fee to the land. *Winslow et al. v. Newell*, 164.
2. And *quare*, whether such person, in the absence of any law giving him a right to recover for betterments made by himself, in faith of his own entry, can re-

cover by referring his entry to that of another person, from whom he purchased the land, and who entered previous to the enactment of the Revised Statutes. *Ib.*

3. But if he can take advantage of such former entry, he can claim nothing by it, if the person making such former entry did not suppose, at the time, that he had a good title in fee to the land. *Ib.*
4. If one take possession of land, and then abandon it, his possession cannot be tacked to that of the next possessor, either for the purpose of making title to the land by possession, or for the purpose of claiming any benefit by virtue of the statute in reference to betterments. *Ib.*
5. A., supposing he had good title to a lot of land, put B. in possession of the land, as tenant. B. subsequently surrendered his possession to A., and purchased of another person a title to the lot, which he did not at the time suppose to be good, and retained the possession until he sold the lot to C., who entered subsequent to the enactment of the Revised Statutes, supposing he had acquired a good title, and made improvements. A. did not convey his title and possession to any one, but subsequently abandoned all claim to the land. And it was held, that C., having been ejected from the land, could not recover for his betterments by virtue of the original entry made by B. in faith of A's title. *Ib.*

BILL IN CHANCERY, *See Chancery.*

BOND, *See Trustee Process* 9, 12.

BOOK ACCOUNT.

1. Where a transient person is taken sick and is in need of relief, and the person, at whose house he is, gives notice to the overseers of the poor of the town in which he resides and requests them to provide for the pauper, and the overseers request him to do what is necessary, he may recover for his services and expenses, in taking care of the pauper, in an action on book account against the town. *Wolcott v. Wolcott*, 37.
2. If the liability of the defendant is only collateral to that of another person, the action on book account cannot be sustained against him. *Smith v. Hyde*, 54.
3. Where the parties entered into a contract under seal, by which the plaintiff was to open a marble quarry belonging to the defendants and furnish marble at a specified price for each cubic foot payable in instalments, and of a specified description, sufficient to supply the defendant's marble mill for a time agreed upon, and the plaintiff quarried a small quantity of marble, which the defendants accepted and used, and it appeared that the contract had not been performed on the part of the plaintiff, but that both parties understood they were acting under the contract, so far as they went, it was held, that the plaintiff could not sustain an action on book account against the defendants, to recover for his labor and expenses, or for the marble delivered to the defendants, but that his only remedy was by action of covenant upon the contract. *Myrick v. Slason et al.*, 121.

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4. And it was held, that the rights of the plaintiff, in this respect, were not varied by the fact, that the defendants, after the undertaking begun to look discouraging, encouraged the plaintiff to proceed, and expressed their confidence in his ultimate success. *Ib.*
 5. And even if the parties had abandoned all expectation that the marble finished would be accounted for at the rate fixed in the contract, and treated it as a distinct matter, still, as it resulted from an attempt on the part of the plaintiff to perform the contract, the defendants, by accepting it, would not preclude themselves from showing, in defence, that they had in fact received less than enough to compensate them from what damages they had sustained by reason of the failure of the plaintiff to perform his contract. *Ib.*
 6. And it makes no difference, in such case, that the contract was entered into by the parties rashly, or that it has proved disastrous in its result, or that both parties were mistaken in their estimate of the expense necessary to carry the contract into effect on the part of the plaintiff, or that it has proved extremely difficult, without great and disproportionate expense, to carry the contract into effect, according to its terms. *Ib.*
 7. Presumption of payment of an account, arising from lapse of time, is matter of fact, of which advantage must be taken before the auditor. *Graves et al. v. Weeks*, 178.
 8. If it becomes material to prove the laws of another state in an action on book account, they must be proved, as facts, before the auditor, and must be stated in the report;—and if nothing is stated in the report in reference to such laws, and the county court accept the report, *quare*, whether the supreme court will not presume that such laws are not variant from those of our own state upon the same point, and affirm the judgment. *Terrill v. Woodruff*, 182.
 9. In this action, which was on book account, the plaintiff, who was a counsellor at law in the state of New York, but not an attorney, claimed to recover for services rendered by him in the courts of that state as an attorney, in the name of an attorney whose office he occupied, and who had consented that he might perform such services in his name, but between whom and the defendant there had been no communication; the auditors did not state, in their report, the law of New York in reference to the plaintiff's right of recovery for such services; and this court held, that they could not say from any authorities produced before them, that the plaintiff would not be entitled to recover for these services, if the action had been commenced in the state of New York; and the judgment of the county court, which was in favor of the plaintiff upon the report, was affirmed. *Ib.*
 10. One of two tenants in common of personal property cannot recover against the other, in an action on book account, for having used more than his share of the common property. *McCullis v. Banks & ux.*, 442.
 11. If the defendant have been guilty of a tort, in having used, without the plaintiff's permission, personal property belonging to the plaintiff, for which

the plaintiff might recover in an action of trover, the plaintiff cannot charge and recover for such property on book account. *Ib.*

12. In this case, which was an action on book account, the facts being very indefinitely stated by the auditor, the report was re-committed. *West v. Culling*, 536.
13. In an action on book account the non-joinder, as defendant, of one of the contracting parties is not waived by not being pleaded in abatement, but may be taken advantage of at the hearing before the auditor; and if the fact of such non-joinder is found by the auditor, judgment will be rendered, upon the report, in favor of the defendant. *Bailey v. Hedges et al.*, 618.
14. And it makes no difference, in such case, that the omitted co-contractor resides out of this state, and that he and the other defendants were parties with another person, since deceased, in the business in which the plaintiff's account accrued, and contracted with him as such, and that, in describing the defendants in the writ, they are named as "surviving partners" of the person deceased,—the declaration being in common form, and making no mention of the partnership. *Ib.*

See CORPORATION 1-5; DECLARATION IN OFFSET 1; PRACTICE 7.

CASE, See ACTION ON THE CASE.

CERTIFICATE, See EVIDENCE 4; TAXES 11, 12.

CHANCERY.

1. Every case should be *fully heard* in the court of chancery;—but the chancellor may, in his discretion, make a decree *pro forma*, with a view of saving needless expense to the parties, in case the supreme court should be of opinion the orator cannot prevail. *Hyndman v. Hyndman*, 9.
2. A contract between a mortgagee and mortgagor, in reference to the purchase by the mortgagee of the equity of redemption, will not be positively disregarded in a court of equity; but such contracts are viewed suspiciously, and the conduct of the mortgagee will be watched very narrowly. *Ib.*
3. In this case the orator, being indebted to the defendant, executed to him an absolute deed of his farm, taking back a writing of defeasance. The orator received from the defendant further advances, until the sum due amounted to \$610. The parties then agreed, that the defendant should have the farm for \$800; and the defendant gave his note to the orator for the difference between that sum and the amount due upon the mortgage, and the orator surrendered his writing of defeasance;—but it was agreed verbally between them, that the defendant should sell the farm and the orator should have what he received over \$800, after paying defendant for his time and trouble. And it was held, that the contract must, in equity, be still considered as a mortgage, with a power of sale in the mortgagee, and that the orator should be allowed to redeem the premises upon a bill brought for that purpose.
4. And the orator was allowed to redeem, notwithstanding the defendant had, in

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- pursuance of his power of sale, caused the premises to be sold at auction and became *himself* the purchaser. *Ib.*
5. Where, upon the hearing before the chancellor on a bill of foreclosure, the mortgage described in the bill was not produced by the orator, but the defendant admitted its existence and original validity, and the case proceeded as though it had been produced, the defendant was not allowed, upon the hearing on appeal in this court, to raise any objection on account of the absence of the mortgage, as a ground for reversing the decree. *Dunshee v. Purweler, Adm'r.* 172.
6. In this case the mode, adopted by the master for computing the interest upon the mortgage note, was one long in use, but was objected to, on the hearing on appeal; but the question not having been argued, the court declined to consider it. *Ib.*
7. Where, upon the hearing in this court of a case appealed from the court of chancery, the reading of certain testimony was objected to, for the reason that it was taken and filed after the rule for taking testimony in the case had expired, and it did not appear that it was used at the hearing before the chancellor, but it appeared that both parties filed their exhibits in the case after the taking of the testimony objected to, it was held, that the parties must be considered as having kept open, by consent, the time for taking testimony, beyond the general rule. *Gibson et al. v. Briggs et al.*, 176.
8. But as the opposite party claimed, that he had only omitted to file a motion to suppress the testimony, as incompetent, because he did not consider it in the case, the court allowed the matter to stand upon the hearing, the same as if such motion had been filed in proper time. *Ib.*
9. The supreme court of this state is not denominated a court of chancery, but is an appellate court from the final decrees, and those only, of the court of chancery; and its powers are limited to the correction of errors found in such decrees. *Slason v. Cannon et al.*, 219.
10. After a case has been heard and decided in the supreme court upon an appeal from the court of chancery, the supreme court have no power to sustain, or allow, a bill of review. The power in relation to such bills must be exercised by the court of chancery. *Ib.*
11. There is nothing in chapter thirty-three of the Revised Statutes, in reference to "New Trials," which confers upon the supreme court power to grant a re-hearing in a case decided on appeal from the court of chancery. *Ib.*
12. *Quare*, Whether the court of chancery can sustain a bill of review, pending an appeal of the case to the supreme court. If not, the want of remedy, in case of new evidence being discovered between the time of the hearing before the chancellor and the subsequent determination in this court, is a defect in the law, which can only be supplied by legislation. *Ib.*
13. In this case it was held, that the defendants were justified, by former decisions made in this state, in contesting the case, and therefore no costs

were allowed to the orators for the proceedings before the court of chancery; but, as the decision of the chancellor was reversed on appeal, it was held, that the orators were, as matter of right, entitled to their costs in this court. *Washburn et al. v. Bank of Bellows Falls et al.*, 278.

14. It is no ground, in chancery, for postponing a prior to a subsequent attachment, that the second attaching creditor was induced to delay his attachment by being told, by the other creditor, that he had already attached the property, when in fact he had not, whereby he gained time and opportunity to put his attachment first upon the property. *Bardwell v. Perry et al.*, 292.
15. In this case the defendants appealed from the decree of the chancellor, and the decree was reversed in this court; and no costs in the court of chancery were allowed to the defendants; but they were allowed their costs in this court, as matter of right. *Ib.*
16. A court of chancery will not ordinarily dismiss a suit on account of any mere informality in the position in which the parties are placed, as orators, or defendants, if all the parties interested are before the court, and a proper case is proved for the interference of the court. *West v. Bank of Rutland et al.*, 403.
17. An allowance of a claim by the probate court is not conclusive upon the court of chancery, upon a bill seeking relief against the claim upon grounds of mere equitable cognizance. *Ib.*
18. If one sign, or indorse, a note, as surety for several joint principles, and one of the principals dies, the surety, having paid the debt, may claim a dividend from the estate upon the entire debt, notwithstanding he may hold collateral security for his liability. Where the security is merely collateral, a court of equity will not compel its application, merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co-surety. *Ib.*
19. At law, as a general rule, a married woman can neither sue, nor be sued, unless in connection with her husband. But in chancery, whenever the interests of the two are conflicting, the wife is allowed to bring a suit against her husband, and the husband against the wife, as if they were sole and unmarried. *Porter et al. v. Bank of Rutland et al.*, 410.
20. The husband is competent to act as trustee of his wife's separate property as well as any other person, if duly appointed; and he will sometimes be regarded as such, with a view to the protection of the wife's separate property against his creditors, without any appointment whatever. *Ib.*
21. Where it appeared, that the father of a married woman intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and he subsequently enclosed, in a letter, to her husband a check for \$1000, payable to his daughter, or bearer, and expressed in the letter a wish that the money might be so invested as would be for the mu.

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- tual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them, and it appeared that she then had three children, the court considered the evidence sufficient to justify them in finding, that the intention of the father was, to set apart this fund for the exclusive benefit of his daughter and her children, and to place it under the control of her husband, as her trustee. *Ib.*
22. And when the wife, in such case, brought a bill to compel the appropriation to her benefit of certain bank stock, which she claimed was purchased with such trust funds, but which had always stood in the name of her husband, and the husband was made defendant in the bill, it was held, that his answer, admitting that the property was purchased by him with the trust funds, was, so far, evidence in favor of the wife against the other defendants, who had attached the property and claimed to hold it as creditors of the husband. *Ib.*
23. But the answer of the husband, in such case, is not evidence against his co-defendants, to charge them with notice of the trust. *Ib.*
24. Although the general rule is, that an answer, responsive to the bill, is evidence of the facts therein asserted, and cannot be overcome by the testimony of one witness, yet, when the orator seeks to charge a banking corporation with notice of a trust, and the corporation answers by one of its officers, fully denying such notice, and the orator introduces the deposition of another officer of the corporation, showing such notice to him, some modification of the general rule would seem to be required, inasmuch as notice given to one officer may not have been communicated to another officer, and therefore the answer and testimony would not necessarily conflict with each other. *Ib.*
25. Where it appeared, that certain stock in a banking corporation was purchased with trust funds belonging to a married woman, but stood upon the books of the bank in the name of her husband, and that the corporation, holding a promissory note against the husband, upon which a third person was liable as indorser, had commenced a suit upon the note and attached the bank stock as the property of the husband, and therefore a bill was brought by the wife, to enforce the execution of the trust, making the indorser of the note, the corporation and her husband defendants, and averring, that the indorser had paid, or deposited, the amount due upon the note, and that the corporation had commenced the suit and made the attachment upon the note by the direction and for the sole benefit of the indorser, and charging the indorser with notice of the trust, but omitting to charge the corporation with such notice, it was held, that the indorser could not thus be treated as the sole person in interest, and that, for the purposes sought by the bill, it was doubtful whether he need to have been made a defendant, and that, at all events, notice to him of the trust not having been proved, he must be dismissed, with his costs; and that, notice of the trust to the corporation not having been averred in the bill, the corporation must also be dismissed from the suit, notwithstanding the fact of such notice was denied in the

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- answer of the corporation, as though it had been averred in the bill, and the answer was traversed, and the court, from the testimony, found that the corporation had in fact received such notice. *Ib.*
26. But it was also held, that, inasmuch as the result arrived at by the court, so far as respected the controversy between the orator and the corporation, was not necessarily conclusive of the rights of the former, it would be competent for the chancellor, upon such terms and conditions as he might think just and equitable, to allow an amendment to the bill, or perhaps a supplemental bill to be filed, presenting the matter of notice of the trust to the corporation. *Ib.*
27. This court do not regard an absolute conveyance of property, with a secret clause of defeasance, written or verbal, as a conclusive badge of fraud; but such conveyance is open to suspicion. *Smith v. Onion et al.*, 427.
28. Where a creditor, who has levied his execution upon land thus conveyed, brings a bill to set aside the conveyance as fraudulent, and, upon the coming in of the answers, it appears that the conveyance was in fact intended as a security, and that a bond of defeasance was given back, the regular course is, for the orator to amend his bill, by inserting a prayer, that the conveyance may be treated as a mortgage and he be allowed to redeem. *Ib.*
29. Where a debtor conveyed, to one who had formerly been his partner, for the purpose of securing to him such partnership balance as might ultimately appear to be due to him, real and personal property to a large amount, by conveyance absolute upon its face, but taking back a deed of defeasance, and the person to whom the conveyance was thus made refused to disclose to the orator, who was an execution creditor of the one who made the conveyance, the amount of his lien upon the property, and it appeared, that the amount of that lien was not in fact ascertained at the time the conveyance was made, although that might probably have been done with considerable accuracy, and the orator had levied his execution upon a portion of the real estate thus conveyed, treating it as the property of the debtor in fee, and then brought this bill, to have the conveyance set aside, or to be allowed to redeem, and it now appeared, that the amount of property conveyed was more than sufficient to pay all the liabilities of the debtor to his partner, even after taking out the estate levied upon by the orator, it was decreed, that the defendants might, at their election, convey to the orator, by suitable deeds, the land levied upon by him, or pay to him the amount due upon his execution, and receive a conveyance from him; and that, in either event, cost should be taxed against the defendants. *Ib.*
30. In a case appealed to this court from the court of chancery a motion to suppress testimony will not be heard as a preliminary question;—but only upon the general hearing of the case. *Ib.*
31. Testimony will not be suppressed, merely for the reason that it was taken by one who is master in chancery in an adjoining county. The power of the court of chancery to appoint such a person a special examiner cannot be.

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- doubted; and the appointment of a special examiner need not appear upon the papers in the case. *Ib.*
32. In this case the court held that the appellant, in a case coming to this court from the court of chancery, must furnish the copies; but that the copies, required by the rules of the court of chancery to be furnished in that court, belonged to the case and should come up with it. *Hilton et al. v. Fullerton*, 433.
33. The answer of a defendant to a bill of foreclosure, averring distinctly, that, at a certain time, he paid to the administrator of the mortgagor a certain amount of money, which sum the administrator, in presence of the defendant, paid to the orator, to be applied to the payment of the mortgage note, is strictly responsive to the bill, and therefore legitimate evidence in the case. *Grafton Bank v. Doe et al.*, 463.
34. The general rule, in equity as well as at law, is, that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record, only, will be regarded, a court of equity will, in a case of insolvency, regard the real parties,—those ultimately to be affected by the decree,—and allow a set-off of demands in reality mutual, although prosecuted in the name of other persons, nominally interested. *Blake et al. v. Langdon et al.*, 485.
35. Courts of equity exercised a jurisdiction over the subject of set-off previous to the enactment of the statutes upon that subject; and their jurisdiction does not in any manner depend upon those statutes. *Ib.*
36. In this case, B. and H. were partners, B. furnishing the capital stock, and it was agreed between them, that B. should continue to furnish a certain amount of capital, and that, in lieu of interest and profits, H. should pay him a specified sum each year during the continuance of the partnership. Subsequently B. and M. formed a co-partnership in the same business, and became the successors of B. & H., the firm of B. & H. continuing only for the purpose of closing the former business; and M., who was the active partner, paid from time to time, at the request of H., with the property of B. & M., debts due from the former firm, and charged the same to B. & H. upon the books of B. & M., and also received a note from H. signed with the name of the former firm, and also, for the purpose of paying a note due from a third person to B. & H., executed a negotiable promissory note to H. alone. This note was afterwards put in suit in the name of an indorsee, before the repeal of the statute allowing the maker of a negotiable note to have the benefit, as against the indorsee, of all legal and equitable defences to the note. And it was held, upon a bill in chancery brought by B. and M. against H. and the indorsee of the last named note, that the account charged upon the books of B. & M. to B. & H. and the note held by B. & M. signed with the firm name of B. & H., must be set off against the note executed by B. & M. to H. and sued in the name of the indorsee,—it appearing that H. had become insolvent. *Ib.*

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37. And it was also held, that if H., in such case, would seek to avoid the contract entered into between himself and B., he must file his cross bill, setting forth the grounds upon which he claimed relief. *Ib.*
38. A nominal party to a contract, who has assigned all his interest, is only required to be joined in any proceeding in equity, in regard to the contract, for the purpose of having the decree conclude his rights, and thus conclude all future litigation. So that, in all such cases, when the court of chancery can see, in the particular case, that there exists no necessity for the joinder of such party on that account, it will not be required,—especially after the case has gone to a hearing. *Day v. Cummings*, 496.
39. A nominal party to a contract, in regard to which a suit in equity is pending, who is so divested of all interest as not to be a necessary party to the bill, is a competent witness in the case. *Ib.*
40. Where usury has been paid upon a note, in pursuance of a contract made at the time of its execution, and the payee seeks afterwards to enforce the collection of the note by a suit at law, a court of equity, upon a bill brought by the maker of the note, will order that the sum so paid be allowed as a payment upon the note, computing simple interest. *Ib.*
41. But where usury has been paid upon notes, which have been subsequently put in suit, and judgments have been recovered upon them and satisfied in full, which judgments still remain unreversed, a court of equity will not interfere to relieve the party making such usurious payments. *Ib.*
42. Any defence, which might be interposed at law to defeat a recovery upon a contract, or a portion of it, must be so interposed, or it is concluded by the judgment. *Ib.*
43. It is in accordance with the usual equity practice, when a party seeks, in a court of chancery, to obtain relief against a portion of the amount due upon a contract attempted to be enforced against him at law, and is successful, to have the entire case finished in the court of chancery, so as to put an end to any further litigation between the parties in reference to the entire contract;—although there are many exceptions to this practice. *Ib.*
44. Where the orator alleged in his bill, that a former firm, of which he was a member, and of which he was now the sole representative in interest, had made payments to the defendant of usurious interest upon notes which the defendant was now seeking to enforce against the firm by a suit at law, and also alleged that he had himself paid usurious interest to the defendant upon a note given by him to the defendant in the course of his individual business, which note he had subsequently paid in full, and prayed that he might be allowed for the payments so made, and the bill was not demurred to, nor objected to, in the court below, on the ground of multifariousness, it was held, that relief should be afforded the orator for all the payments so made, although, in strictness, it was involving distinct matters in the same bill. *Ib.*
45. In this case the orator was allowed his costs, having prevailed upon all the points litigated, excepting those from which he was precluded by a mere technical bar really shutting out the true equity of the case. *Ib.*

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46. Where a defendant, in his answer to a bill of foreclosure, insists that he has made payments upon the mortgage notes, and it is referred to a master to ascertain the sum due in equity, and he makes his report, to which no exceptions are taken, no question can be made upon that point in the supreme court, upon appeal. *Martin v. Bowker*, 526.
47. Courts of equity act in analogy to the statute of limitations; and if, in a suit for the foreclosure of a mortgage, the lapse of time be such, that the orator could not maintain a suit at law for the recovery of the mortgaged premises, a court of equity would presume payment and satisfaction of the mortgage debt. This period is fixed, by our statute, at fifteen years. *Ib.*
48. But the payment of interest upon the debt, by the defendant, or of any portion of the principal, or any other act recognizing the existence of the mortgage and that it was unsatisfied and obligatory upon him, would be sufficient to repel the presumption of payment and take the case out of the operation of the statute. *Ib.*
49. In this court appeals from the court of chancery are invariably heard entire. *Merrill v. Kittredge et al.*, 528.
50. Objections to mere matters of form, which are regulated by the established rules of the court of chancery, will be considered as waived, if not taken in that court;—and if taken there, and overruled, the decision of that court will be held final. *Ib.*
51. Where usury is included in mortgage notes, and a bill of foreclosure is brought, the defence, based upon the usury, must be made in that suit, or the decree will conclude the right. But if the *original contract*, evidenced by the mortgage notes, was not usurious, the *subsequent* payment of usury upon it has no legal connection with it; and the amount so paid may be recovered back in an action for money had and received, notwithstanding a decree of foreclosure may have been obtained, without any allowance for the usury so paid. *Gow v. Abbe*, 540.
52. Where creditors, after the debt has been paid to them, seek to enforce a judgment against a receiver of the property attached in the suit brought for the collection of the debt, a court of equity, to prevent circuity of action, will interfere and enjoin the suit. *Paddock v. Palmer et al.*, 581.
53. The judgment against the receiver, in such case, being merely collateral to the debt, is in the nature of a penalty; and if payments were made towards the debt, prior to the recovery of the judgment against the receiver, and not allowed for in making up that judgment, a court of equity will interfere and restrict the creditor to the collection of the amount actually due. *Ib.*
54. Where it is obvious, in such case, that the creditors, after having obtained judgment against the receiver for the full amount of the debt, making no allowance for payments which had been actually made to them previously, received from the receiver the balance actually due to them upon the debt, and, by words and actions, gave him to understand that they considered the judgment against him paid, with a mere view of keeping him along until his remedy by petition for a new trial should be gone by lapse of time and then pursued.

ing him for the balance appearing due upon the judgment against him, there can be little doubt, that a court of equity may enjoin the judgment upon the *mere ground of fraud*. *Ib.*

See PARTNERSHIP 1-4.

COLLECTOR, *See TAXES.*

COMMISSIONERS, *See HIGHWAYS 1, 2; MORTGAGE 7.*

CONSIDERATION, *See CONTRACT 3, 16, 17; DEED 1; PROMISSORY NOTES 4; TRUSTEE PROCESS 2.*

CONSTABLE, *See PROCESS 6; STATUTE 7.*

CONTRACT.

1. If a physician commence attending upon a patient, under a contract that if there is no cure there shall be no pay, he cannot recover for his services, or medicines, unless he show a performance of the terms of the contract upon his part. *Smith v. Hyde*, 54.
2. Words used in a contract are not to be construed in a frivolous or ineffectual sense, when a contrary exposition can be given them; and where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted, which would give effect to the instrument as a legal contract, rather than that which would render it inoperative. *Thrall v. Newell*, 202.
3. The defendant executed to the plaintiff a written assignment in these words, "I hereby assign to Reuben R. Thrall a note in my favor against Theodore Woodward and John H. Philips, dated 13th Nov. 1838, for one hundred and fifty dollars payable in one year from date with use for value received;" and it was held, that the words "for value received" were not merely descriptive of the note assigned, but that, *prima facie* at least, they imported a sufficient legal consideration for the assignment. *Ib.*
4. And it was held, that such instrument, in describing the property assigned as "a note," must be construed as an express warranty, on the part of the defendant, that it was a valid note, and that the signers were of sufficient capacity to contract, when they executed it,—and *quare*, whether such a warranty would not be implied from the sale, without words indicating an express warranty. *Ib.*
5. And where it appeared, in such case, that the note assigned to the plaintiff was invalid as to one of the signers, by reason of his insanity at the time he signed the note, and that an action upon the note had been successfully defended by him upon that ground, and that the other signer had removed from the state, it was held, that the plaintiff, in an action upon the warranty contained in the written assignment, was entitled to recover the difference between the actual value of the note and the amount appearing due upon it. *Ib.*
6. A contract entered into upon Sunday is not a violation or in any way in contravention of the statute of this state, if entered into in another state.—*Adams v. Gay*, 858.

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7. Such contract is not so far *contra bonos mores* at common law, as not to form the proper subject matter of an action in the courts of this state. *Ib.*
 8. The statute laws of another state, when relied upon as a defence to a contract upon the ground of its illegality, must be proved, upon the trial, like any other facts in the case, and cannot be supplied in the supreme court, by producing there the statute book of that state. *Ib.*
 9. All contracts of a secular character, and which are not properly works of necessity, or charity, if finally consummated upon Sunday, are void under the statute of this state; so that, while matters remain in this condition, no action, can be maintained, either upon the contract, or for any thing done under it, or growing out of it. *Ib.*
 10. But contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts which are void for illegality. They are not tainted with any general illegality, but are illegal only as to the time in which they are entered into. It is not sufficient to avoid them, that they have grown out of a transaction upon Sunday; they must be finally closed upon that day. And although closed upon that day, yet if affirmed upon a subsequent day, they then become valid. *Ib.*
 11. And in all cases of contracts entered into upon Sunday, if either party have done any thing in execution of the contract, it is competent for him, upon another day, to demand of the other party a return of the thing delivered, or, where that is impracticable, compensation; and if the other party refuse, the original contract becomes thereby affirmed, and the same rights and liabilities are induced, as if the contract had been made upon the latter day. *Ib.*
 12. This is an indispensable exception to the general rule in regard to illegal contracts, in order to secure parties from fraud and overreaching, which would, otherwise, be practised upon Sunday by those who know their contracts are void, and that they are not liable *civiliter* for even frauds practiced upon that day. *Ib.*
 13. It is well settled by repeated adjudications in this state, that if a party, under a contract to labor for a specified period, leave the service of the party with whom he contracted, before the expiration of the time and without sufficient cause, he cannot sustain an action thereon. *Mullen v. Gilkinson*, 508.
 14. It is no sufficient cause for abandoning such contract, that the party was employed, with his own consent, upon work not contemplated at the time the contract was made. *Ib.*
 15. Nor that the person making such contract had difficulty with another person in the service of his employer, and his employer refused, upon his solicitation, to discharge such other person. *Ib.*
 16. It is well settled, that a contract may be avoided for an entire want of consideration, or failure of consideration. But where the plaintiff sold a clock and a horse for a harness and two promissory notes, and falsely and fraudulently warranted the horse to be safe and kind, and it appeared that the horse had such an inveterate habit of kicking as to render him worth-

- less, it was held, that there was not such an entire failure or want of consideration as to constitute a defence to the notes, notwithstanding the clock had not been in fact delivered by the plaintiff. *Morrill v. Aden*, 505.
17. But it was held, that the failure of consideration, in such case, was such as to authorize the defendant to rescind the entire contract; and it appearing that he had offered to do so in reasonable time, and that the plaintiff had refused to receive the horse and surrender the notes and harness, it was held, that this constituted a sufficient defence to an action upon the notes. *Ib.*
18. Where a sale of personal property is absolute, and there is no fraud, the vendee cannot compel the vendor to receive back the article, if it proves deficient in quality; but he must resort to his action upon the warranty, if there were one. *West v. Cutting*, 536.
19. Where the defendant sold to the plaintiff a quantity of tea, which proved not to be good, and the plaintiff returned the tea to the defendant, who received it, and said that he should have some good tea soon and would replace it, to which the plaintiff assented, it was held, that this did not prove an absolute contract of rescinding, which would make the defendant debtor to the plaintiff, either for the money, or for the tea, unless called for; and that it imported no obligation, on the part of the defendant, to carry the tea to the plaintiff. *Ib.*
20. In such case the obligation of the defendant, being merely to deliver tea when called for, could not, by mere lapse of time, become an obligation to pay money. *Ib.*

See Book Account 3-6; Evidence 1; Fraud 1; Guardian 2, 3; Infant 2; Pleading 9; Poor 19, 21, 23; Promissory Notes; Sheriff 3; Trover 1; Trustee Process 2.

CONTRIBUTION.

1. One of two joint contractors, having paid the whole debt, may sustain his action for contribution against his co-contractor, notwithstanding the statute of limitations had run upon the claim at the time the payment was made. *Mills v. Hyde*, 59.
2. Where one of several joint contractors pays the whole debt, he may, in an action at law against a co-contractor for contribution, prove the insolvency of any of the other joint contractors, and recover an aliquot part of the whole debt, having regard only to the number of solvent contractors. *Ib.*

See Trustee Process 15.

CORPORATION.

1. The principles, as to the right of an individual to bring a suit at law against a corporation, of which he is a member,—as to the right of one committee-man, trustee, or agent, among several jointly constituted, to recover in an action on book account for services and expenditures performed and made on his own private account for the corporation,—and as to the authority of

- these subordinate agencies to pledge to each other, individually, the responsibility of the body for whom they act,—as decided in *Ceer v. School District No. 10* in *Richmond*, 6 Vt. 76, and in *Sawyer v. Meth. Ep. Soc. in Royalton*, 18 Vt. 405,—recognized and affirmed. *Rogers v. Darby Universalist Society*, 157.
2. Where several individuals signed articles of association, for such purposes as are contemplated by the statutes of Oct. 26, 1797, and November 10, 1814, and the form adopted was substantially in conformity to the one prescribed, and provided for the election of three trustees, a secretary, treasurer and other officers, and no words were used indicating an intention not to form themselves into a body corporate, it was held, that they became a body corporate, under those statutes, notwithstanding they did not describe themselves as inhabitants of any town, and made no reference, in their articles of association, to the first section of the statute of 1797. *Ib.*
3. And where, in such case, the association was formed for the purpose of building a meeting house, and by one of the articles the capital stock was fixed at \$2500, and by another the size and style of finishing the house were prescribed, it was held, that the article fixing the amount of capital stock could not be regarded as limiting the cost of the house, and that one of the trustees, who had rendered services and made expenditures in constructing the house, on his own account, in pursuance of a contract between him and the other trustees, might recover therefor in an action on book account against the association, notwithstanding the whole cost of the house much exceeded the amount of the capital stock. *Ib.*
4. And it was held, that the defendants, in such case, could have no claim to recover against the plaintiff, who was one of the trustees, the amount of demands due to the association, which were left by the trustees with an attorney at law, for collection, and were settled with him, but never accounted for to the plaintiff. *Ib.*
5. And it was also held, that the defendants had no right to claim, in this action, that there should be an amount deducted from the plaintiff's account, equal to his proportion of the outstanding debts of the association, taking his subscription and the aggregate of all the other subscriptions as the basis of computation. *Ib.*
6. The statute of Nov. 8, 1815, which provided that private corporations might, by their vote, authorize their president to convey real estate belonging to them, and that the deed of such president, reciting the vote of the corporation thereunto authorizing him, and being duly executed, acknowledged and recorded, should be sufficient to pass the title, was designed to and did, so far as corporations were concerned, supersede the statute of March 6, 1797, in reference to conveyances of real estate; and the mode mentioned in the statute of 1815 was intended to be the *uniform* and the *only* mode of conveying land by corporations. *DAVIS, J., dissenting. Isham, Adm'r, v. Bennington Iron Co. et al.*, 230.
7. The essence of the requisition of the statute of 1815 is, that the deed must be executed in pursuance of *some* vote of the corporation, and that this vote must be recited in the deed. *Ib.*

8. But, even under the statute of 1797, where a deed, which professed to be the deed of a corporation, was signed by a person, who described himself, in his signature, as "chairman" of the corporation, and no vote, authorizing him to sign the deed, was recited, and the records of the corporation showed no such vote, it was held, that no sufficient evidence of the consent of the corporation to the deed was shown, notwithstanding all the individual corporators were parties to the deed, and executed it, for the purpose of conveying, by the same deed, all the shares in the capital stock of the corporation;—and it is not sufficient, that the corporators *now* say they consented to the execution of the deed by the chairman, on behalf of the corporation. *Ib.*
9. So under that provision of the statute of 1797, which required that deeds of land should be "signed and sealed," it was held, that a deed, purporting to be the deed of a private corporation, called "The Bennington Iron Company," and which was signed "Charles H. Hammond, Chairman Bennington Iron Co.," was not sufficiently signed to render it a valid deed. It was necessary, under that statute, that the *name* of the grantor should be *subscribed* to the deed, in order to designate it as his deed. *Ib.*
10. And it is not sufficient, to supply this defect, that the deed is sealed with the corporation seal. *Sealing*, in case of a corporation, does not import *signing*, nor obviate the necessity of having the *name* of the corporation subscribed to the deed. *Ib.*
11. And where such deed was signed by one as "chairman" of the corporation, and he affixed to the deed the corporation seal, and there was also annexed to the deed a certificate of the oath of the chairman, that the seal so affixed was the *seal* of the corporation, and that it was affixed by their authority, it was held, that this was no sufficient *acknowledgment*, under the statute of 1797. *Ib.*
12. Notice to the president of a banking corporation, that stock, standing upon the books of the bank in the name of one person, is held by him in trust for another, should be considered as notice to the corporation. And it is not necessary, in order to affect the corporation with notice of such trust, that there should have been a full communication of all the circumstances connected with it. It is enough, in such case, if the party be put upon inquiry. *Porter et al. v. Bank of Rutland et al.*, 410.
13. Depositions of stockholders in a banking corporation are inadmissible as evidence in favor of the corporation. *Ib.*

See CHANCERY 24, 25.

COSTS.

1. In this case both parties having taken exceptions, and the judgment of the court below having been affirmed, no costs of this court were allowed to either party. *Mills v. Hyde*, 59.
2. If the defendant prevail upon his exceptions, and judgment is rendered in favor of the plaintiff for a reduced sum, the defendant's costs in the supreme

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- court are to be set off against the judgment in favor of the plaintiff, and execution to issue for the balance only. *McCullis v. Banks et ux.*, 442.
3. In this case, which was an appeal from an order, made by the probate court, that the defendant, in a proceeding commenced by an executor, for the purpose of compelling the defendant to make a discovery, under oath, as to property of the estate in his hands, answer certain interrogatories, the trial having proceeded in the county court upon the propriety of the interrogatories, and the question as to the regularity of the appeal not having been raised in that court, but the appeal having been dismissed in the supreme court, no costs in the county court were allowed to either party; and as to the costs in the supreme court, the parties were left to their legal rights. *Kimball, Ex'r, v. Kimball*, 579.
 4. In this case both parties took exceptions in the county court, and the judgment being affirmed in the supreme court, no costs in the supreme court, were allowed to either party. *Green v. Shurcliff et al.*, 592.
 5. Where the plaintiff recovered judgment in the court below, and the defendant filed exceptions, but execution was not stayed, and the defendant neglected to prosecute the case in this court, it was held, that this court would affirm the judgment, and also, that the plaintiff was entitled to costs in this court, unless he had reasonable notice, in writing, before the commencement of the term, that the case would be abandoned. *Kelly v. Haskell*, 601.
 6. A defendant, who takes exceptions to the decision of the county court, and who prevails upon his exceptions, is entitled to have his costs in the supreme court deducted from the plaintiff's costs in the court below, even though the plaintiff ultimately prevail in the case. *Ex'rs of Stevens v. Hollister*, 695.
 7. This court will not order security to be given, by way of recognizance, for costs in the case in the county court, either past, or future, nor for costs in this court, where the case came into this court upon exceptions. *Levermore v. Bond*, 607.

See CHANCERY; TRUSTEE PROCESS 14.

COUNTY COURT.

1. The effect of the statute,—Rev. St. c. 33, § 8,—giving the county court authority, in their discretion, to set aside a judgment rendered by a justice of the peace by default, when the party has been deprived of his day in court by fraud, accident, or mistake, is to give to the county court the same power, in examining the proceedings of a justice, in cases within the statute, which they might exercise in examining their own proceedings. *Moses v. Brigham*, 457.
2. In this case judgment was rendered by a justice of the peace by default, and the justice certified in his record, that notice to the defendant of the pendency of the suit was proved; but it was held, that the defendant, on

petition to the county court, founded upon the Revised Statutes, chap. 33, sec. 8, might prove, by parol evidence, that he did not in fact have any notice of the suit prior to the rendition of the judgment. *Ib.*

See RECORD 2.

COURTS, *See CHANCERY; COUNTY COURT; SUPREME COURT; VERMONT CENTRAL RAIL ROAD CO. 2-4.*

COVENANT, *See Book ACCOUNT 3 6.*

COVERTURE, *See HUSBAND & WIFE.*

CRIMINAL LAW.

1. Where a respondent was indicted for discharging a gun at a person and wounding him, and the person injured was a witness on the trial, and it appeared that the affray took place on the premises of the respondent, it was held, that the respondent might prove the declarations of the witness, made while on his way to the place where the affray happened,—the witness, upon being inquired of on cross examination, having denied them. And *quare*, whether such declarations and the acts of the witness, while going to the place, might not be proved without inquiry on cross examination, as showing the intent with which he went there. *State v. Goodrich*, 116.
2. In such case evidence might be proper of previous threats made by the witness as to the respondent, and of previous affrays between them, if so connected with the affray in question as to have any tendency to show that the respondent, at the time, had just cause of alarm, and to fear serious injury to his person, or property. But where a case is so indefinitely stated upon the bill of exceptions, as to leave it uncertain how far evidence offered was admissible, it will not be presumed that there was error in the court below in rejecting the evidence. *Ib.*
3. The proviso to the statute of October 30, 1844, giving the county court jurisdiction in cases of theft and receiving stolen goods, where the value of the property does not exceed seven dollars, is to be construed as giving jurisdiction of such cases to justices of the peace, if proceedings shall first be commenced before them. *Treasurer of Vt. v. Clark*, 129.
4. If one of the counts in an indictment is correct, it is sufficient, upon motion in arrest of judgment. *State v. Bean*, 530.
5. In an indictment for forgery a variance between the count and the forged instrument, in the spelling of a name, is unimportant, if the same sound is preserved. *Ib.*
6. Where the averments in an indictment for forgery improperly describe the import of the obligation of the contract forged, this defect is not cured by reciting the instrument *in hoc verba*;—but a note in these words,—“For value received I promise to pay Mr. Frank Wilson, or order, the sum of \$25,60 to date the first day of January next and interest,”—sufficiently im-

ports, that it is made payable the first day of January next ensuing its date, and will support an averment to that effect in an indictment for forgery. *Ib.*

DAMAGES, *See Attachment 3; Contract 5; Ejectment 2; Poor 18-23; Recognizance 1, 2; Trespass 4, 5; Vt. Central Rail Road Co., 1-4.*

DECLARATION, *See Pleading.*

DECLARATION IN OFFSET.

1. Under the provisions of the Revised Statutes, which entitle a defendant, who has a demand on book against the plaintiff, to file a declaration in offset, the defendant has no right to file a declaration in the form of an action of account. The statute contemplates a declaration on book account. *Tb-bias v. McGregor, 118.*
2. If, in such case, the defendant file a declaration in account, and judgment to account is rendered, and an auditor is appointed and the case continued, the county court may nevertheless, in its discretion, at a subsequent term, sustain a motion to dismiss such declaration. *Ib.*

DEED.

1. A conveyance of land to a town, for the purpose, as expressed, of having a school house erected and a school taught thereon for the benefit of the youth of the town, for a term specified, of itself imports, in its object, a sufficient consideration to support the conveyance. *Castleton v. Langdon, 210.*
2. An action of trespass *quare clausum frigiti*, for encroachments upon land so conveyed, may be maintained in the name of the town. *Ib.*
3. If the town, in such case, comply with the implied conditions of the grant, by erecting upon the land a school house, in which a school should be kept for a reasonable portion of the time, they will not forfeit the land, nor any part of it, although they should use that portion of it, not wanted for the accommodation of the school house and necessary out buildings, for purposes not connected with the main object in view,—as if they should lease it for purposes of cultivation, or a building for a fire engine, or hay-scales, should be put upon it, or it should be used by an adjacent land owner as a passage way, or it should be used by those attending meeting at an adjacent, meeting house for the purpose of accommodating their teams, or a corner of a meeting house were allowed to rest upon it, without dissent, or a room, in the same building occupied as a school house, should be finished and used by the town for the purpose of holding town and other public meetings. *Ib.*
4. Neither would the town, in such case, forfeit the land, by allowing the building standing thereon to be used for a number of years as an academy, or county grammar school, under a charter from the state locating the school at that particular spot. *Ib.*

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5. Such conveyances are always construed liberally, in support of the object contemplated. *Ib.*
 6. The registry of a defective deed is no notice of title to any one. *Isham, Adm'r, v. Bennington Iron Co. et al.*, 230.
 7. To entitle a deed to registration, it must be executed according to the *statute* requisites, by which the registry of deeds is established;—it is not sufficient, that it is executed merely according to the requirements of the common law. *Ib.*
 8. The effect of a quitclaim deed, in the common form, is to convey simply the right, title and interest, which the grantor then had in the land. *Smith, Adm'r, v. Pollard*, 272.
 9. Nothing inserted in the *habendum* should be construed to extend the meaning of the terms used in the *premises*, or that part which precedes the *habendum*,—at least, if the language employed can be reconciled with the body of the deed. *Ib.*
 10. In this case the deed was in the common form of a quitclaim deed, and the *habendum* was in these words,—“To have and to hold the *premises*, so that neither the said Alexis” (the grantor) “nor any one claiming under him, should thereafter have claim, or right, to the *premises* aforesaid;” and it was held, that it should be construed to have reference to such title and interest, only, as the grantor then had in the land; and that it would not estop him from subsequently acquiring and holding a superior right and title to the land from some other source. *Ib.*
 11. The manure of animals, made upon a farm, whether spread about the barn yard, or lying in piles at the stable windows, or lying in the stables, where it has been suffered to accumulate, will pass by a deed of the free-hold, as appurtenant to it. *Wetherbee v. Ellison*, 379.
 12. Where A. conveyed to B. certain premises for the life of B. and his wife, reserving to himself the right to possess and cultivate the premises for the purpose of enabling him to perform certain covenants upon his part for the support of B. and his wife, and B. subsequently recovered judgment in an action of ejectment against A. for a breach of those covenants, upon which no writ of possession was taken out, it was held, that the judgment terminated A's right to the possession of the premises, and that, if he still undertook to manage the farm, directly, or indirectly, without some new license, he did so as a wrong doer, and acquired thereby no right to the crops raised upon the farm, as against B., or the holder of B's title. *Adams v. Dunklee; Sergeant v. Adams et al.*, 382.
 13. And the granting part, or premises, of the deed having conveyed the farm to B. “for and during his natural life and the life” of his wife, the *habendum* being to B. and his wife, naming her, it was held, that the wife did not take an estate in remainder, after the death of B., but that the entire estate vested in B. for his own life and that of his wife, and that, upon his decease, his administrator became the trustee and holder of the title, for the benefit of the wife. *Ib.*

14. No one can take an immediate and present estate under a deed, who is not named as a grantee in the premises, or granting part, of the deed, provided any one is there named; if no one is there named, the grantee may be ascertained from other parts of the deed. *Ib.*
15. And it is not unusual for the premises to give the quantity of estate granted; and when this is done, the grantee named in the premises at once takes the entire estate described; and any limitation in the *habendum*, designed to abridge, or lessen, such estate of the immediate grantee, in favor of a party not named in the premises, will be treated as repugnant and inoperative. *Ib.*
16. And judgment, in this case, having been recovered by B., in his life time, against A. in an action of ejectment, for a breach by A. of certain conditions under which he was to retain the possession of the farm, and A. having subsequently assumed to manage and cultivate the farm, it was held, that A. acquired no title or attachable interest in the crops thus raised by him upon the farm, and that the administrator of B. might maintain replevin against A. for the crops thus raised, and that an officer, who had attached the crops as the property of A., could not sustain trover against the administrator of B. for taking and carrying away the crops by virtue of his writ of replevin. *Ib.*
17. There is an important difference between a description of the grantees in a deed, which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable, on that account, of different applications;—extrinsic evidence, is not admissible, in the former case, to make the conveyance effectual in favor of any particular person; while in the latter case a resort to extraneous facts and circumstances may become necessary, and is proper, in order to ascertain the individual to whom the description was intended to apply. *Morse et al. v. Carpenter*, 613.
18. Where the plaintiffs in an action of ejectment, who were partners, offered in evidence a mortgage deed, executed by the defendant, and conveying the demanded premises to the plaintiffs by the name of their style of partnership, which consisted of the surnames of the partners, omitting their christian names entirely and describing their place of residence, it was held, that evidence was properly admissible, to show that the plaintiffs were, at the time the mortgage was executed, doing business, as partners, at that place, and that the defendant executed to them, by the name of their firm, the promissory note described in the condition of the mortgage, and that, with this evidence, the mortgage deed was admissible, and, with proof of the defendant's possession of the premises, entitled the plaintiff to a recovery. *Ib.*

See CORPORATION 6-11.

DEFAMATION, *See ESTOPPEL* 2.

DEMURRER, *See PLEADING.*

DEPOSITION.

1. If a deponent have come to reside within thirty miles of the place of trial, subsequent to the giving of his deposition, and this is known to the party who took it, the deposition will not be allowed as evidence on the trial. *Gallup v. Spencer*, 327.
2. Where it was stated in the caption of a deposition, taken on the first day of May, 1844, that it was taken to be used at the term "next to be holden on the first Tuesday of May next," it was held, that one of the words "next" might be rejected as surplusage, and the deposition admitted as evidence. It is no objection to a deposition, that a term of the court intervenes between the time of taking and the term of court at which it is stated in the caption it is taken to be used. *Ib.*

See EVIDENCE 11, 12, 15.

DEPUTY SHERIFF, *See SHERIFF*.

DISSEISIN, *See TRESPASS*.

DISTRAINT, *See TAXES*.

DIVORCE, *See HUSBAND AND WIFE*.

EJECTMENT.

1. Where A. conveyed to B. certain premises for the life of B. and his wife, reserving to himself the right to possess and cultivate the premises for the purpose of enabling him to perform certain covenants upon his part for the support of B. and his wife, and B. subsequently recovered judgment in an action of ejectment against A. for a breach of those covenants, upon which no writ of possession was taken out, it was held, that the judgment terminated A's right to the possession of the premises, and that, if he still undertook to manage the farm, directly, or indirectly, without some new license, he did so as a wrong doer, and acquired thereby no right to the crops raised upon the farm, as against B., or the holder of B's title. *Adams v. Dunklee*; *Sargeant v. Adams et al.*, 382.
2. Under a declaration in ejectment, in the statute form, which charges the defendant with having taken the whole profits of the premises to himself during the time laid in the declaration, the plaintiff cannot, with a view to increase his claim for *mesne* profits, give evidence of such acts of trespass, as arose from the wanton misconduct of the defendant, and which injured the intrinsic value of the premises, without any benefit resulting therefrom to the defendant; and consequently a judgment in favor of the plaintiff, in an action of ejectment, is no bar to a subsequent action of trespass for such wanton acts of the defendant, though committed by him while the action of ejectment was still pending. *Walker v. Hitchcock*, 634.
3. In an action of ejectment against a tenant in possession of land, the writ will not abate, if the landlord is not joined as a defendant, in a case in which the

tenancy is by parol and is unknown to the plaintiff. *Paris v. Berlett et al.*, 639.

4. In this case, which was an action of ejectment, commenced in 1844, the defendants pleaded in abatement, that one M. was owner and landlord of the premises, and that the defendants were his tenants; and issue was joined thereon;—and it was held, that evidence, that M. recovered judgment in an action of ejectment for the same premises, in 1826, against one of the defendants, and that the defendants occupied the premises from that time until 1840, as tenants of M., but not under a written lease, and that the other defendant and a third person executed a mortgage of the premises to M. upon a contract for the purchase of the premises, and that in 1842 M. recovered a judgment against the mortgagors in an action of ejectment founded upon the mortgage, and that from that time until the commencement of this suit the premises had been occupied by the defendants with the consent of M., but without a written lease, and that they had paid rent to him therefor,—it not appearing that the plaintiff knew of such payment of rent, or knew that M. was landlord,—had no tendency to sustain the issue, on the part of the defendants, upon the plea in abatement. *Ib.*

See Execution 5 ; Mortgage 8.

ESTOPPEL.

1. Where a matter in controversy in a suit has been adjudicated in a former suit between the same parties, parol evidence is admissible to show the identity, and then the record of the former recovery, if there have been no opportunity to plead it in the pending suit as an *estoppel*, may be given in evidence, and, as such, will be conclusive. *Perkins v. Walter*, 144.
2. This was an action for slanderous words spoken by the defendant, charging the plaintiff with having stolen certain cloth. The defendant, in pursuance of notice under the general issue, gave evidence tending to prove the truth of the words spoken by him. The plaintiff then gave in evidence a copy of the record of a judgment in his favor in an action of trover, brought by the defendant against him to recover for the alleged taking and conversion of certain cloth; and it was admitted, that the cloth sued for in that action was the same cloth, and all the cloth, in reference to which the words charged as slanderous were spoken by the defendant. And it was held, that the record in the action of trover was conclusive upon the defendant, both as to the title to the cloth, and as to the defence attempted to be set up by him in justification in this suit. *Ib.*

See Deed 10.

EVIDENCE.

1. In an action on a contract for labor, and on trial on the general issue, a person is incompetent as a witness for the plaintiff, who was jointly concerned with the plaintiff in making the contract with the defendant. *Smith v. Keeler*, 57.
2. Where a note, signed by three as joint principals, has been renewed from time to time and paid in part, and then renewed for the balance by the note of

two of the signers, the fact, that the note first given and the renewed notes were left in possession of one of the two, furnishes no presumptive evidence that the amount paid upon the notes was paid by him. After a number of years have been suffered to elapse without claim, the presumption would rather be, that the matter was adjusted between the parties at the time. *Mills v. Hyde*, 59.

8. In an action upon a receipt for property attached, a deputy sheriff, to whom the execution was delivered, is a competent witness to testify that he made a seasonable demand of the property of the officer who made the attachment. *Allen v. Carty et al.*, 65.
4. The certificate of a justice of the peace, of the time when an execution and return of levy upon real estate was recorded in his office, is but *prima facie* evidence; and parol evidence is admissible to show the true time, when such record was made. *Morton et al. v. Edwin*, 77.
5. The justice of the peace, who made such record and certificate, may be called as a witness to prove when the record was in fact made. *Ib.*
6. Where a matter in controversy in a suit has been adjudicated in a former suit between the same parties, parol evidence is admissible to show the *identity*, and then the record of the former recovery, if there have been no opportunity to plead it in the pending suit as an *estoppel*, may be given in evidence, and, as such, will be conclusive. *Perkins v. Walker*, 144.
7. The courts of this state are not bound to take judicial notice of the laws of another state; but they are to be made to appear to the court by evidence. *Territt v. Woodruff*, 182.
8. A defendant, who has been discharged upon his plea of bankruptcy, is a competent witness for the plaintiff, in the same case, against his co-defendant, unless interested; and it makes no difference, that the plaintiff consented to his discharge. *Onion v. Fullerton*, 317.
9. Where the action, in such case, was for money had and received, and the defendant, who was called as a witness by the plaintiff, after having been discharged upon his plea in bankruptcy, testified, that he had been in partnership with his co-defendant, and that, at the request of his co-defendant, he borrowed of the plaintiff, for the use of the firm, the money which the plaintiff claimed to recover in this action, and that he informed the plaintiff, at the time, that he was obtaining the money for the firm, it was held, that this disclosed no interest in the witness, which should exclude his testimony from the consideration of the jury. *Ib.*
10. It is an established rule of practice in this state, that testimony as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, cannot be received, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations;—and in this respect this court have fully sanctioned the English rule, which proceeds so far, as to admit of no exception, even in cases where, when the cross examination was closed, the party wishing to impeach had no knowledge of the variant declarations or inconsistent

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- conduct of the witness, and the witness has departed from court and cannot be recalled. *Downer et al. v. Dana et al.*, 338.
11. But this rule has no proper application to testimony in the form of depositions, whether taken with or without notice, and whether the adverse party attended at the taking, or not; but the party may, in such case, without previous inquiry, prove any inconsistent declarations or conduct of the witness. *Ib.*
12. Where the deposition of a witness is used by one party upon the trial, a deposition of the same witness, taken by the other party, but which is inadmissible as such, by reason of a defect in the caption, may yet be received, as a declaration of the witness, for the purpose of impeaching the testimony contained in the former deposition. *Semb. Ib.*
13. All contracts of a secular character, and which are not properly works of necessity, or charity, if finally consummated upon Sunday, are void under the statute of this state; so that, while matters remain in this condition, no action can be maintained, either upon the contract, or for any thing done under it, or growing out of it. *Adams v. Gay*, 358.
14. A disclosure of one summoned as trustee cannot ordinarily be treated as evidence against another person, who is also summoned as trustee in the same suit. Disclosures of trustees are analogous, in this respect, to answers in chancery. *Downer v. Thpliff & Tr.*, 399.
15. Depositions of stockholders in a banking corporation are inadmissible as evidence in favor of the corporation. *Porter et al. v. Bank of Rutland et al.*, 410.
16. A party of record may call the opposing party as a witness, with his consent, or a co-party, they being divested of all interest in the suit. This is the utmost extent, to which the authorities upon this subject have gone. *Abbott, Adm'r, v. Clark*, 444.
17. An administrator *de bonis non*, in whose name a suit is progressing, is not so divested of all interest as to be a competent witness in the case, notwithstanding it may appear, that the suit was commenced prior to his appointment, and that the estate which he represents is clearly solvent. *Ib.*
18. A married woman can only be admitted as a witness in a case, when her husband would be a competent witness in the same case. *Ib.*
19. In this case judgment was rendered by a justice of the peace by default, and the justice certified in his record, that notice to the defendant of the pendency of the suit was proved; but it was held, that the defendant, on petition to the county court, founded upon the Revised Statutes, chap. 33, sec. 8, might prove, by parol evidence, that he did not in fact have any notice of the suit prior to the rendition of the judgment. *Mosseaux v. Brigham*, 457.
20. Where a suit is prosecuted by an administratrix for the benefit of the heirs at law of the estate, the heirs, in case of failure to recover, are liable to contribute for the payment of the costs incurred; and one of the heirs, who has received a portion of the estate in land, is not rendered a competent witness

for the plaintiff by executing to her a release of all his interest in any portion of the estate growing out of the claim in controversy,—his liability for costs being thereby in no manner affected. *Hopkinson, Adm'r v. Guildhall*, 538.

See ACCOUNT 4; BOOK ACCOUNT 7; CRIMINAL LAW 1, 2; DEED 17, 18; EJECTMENT 4; EXECUTION 14; PAYMENT 3; PLEADING 19; POOR 17; PROMISSORY NOTES 6, 12, 13; RECOGNIZANCE 5; SHERIFF 2; TAXES 11; TRESPASS 6.

EXCEPTIONS.

1. Where papers, referred to in the bill of exceptions, and which were placed on file at the time the case was made up, have been destroyed, without the fault of the party, previous to the hearing in this court, he will not be allowed to supply the defect by means of *ex parte* affidavits, which have not been filed in the case. But it would seem, that affidavits would be received for this purpose, if taken with notice, or placed on file in season to allow the opposite party to file counter evidence. *Fish v. Field & Tr.*, 141.
2. The supreme court cannot, on exceptions, review any matter within the discretion of the county court. *Mosseaux v. Brigham*, 457.
3. When a case came into the county court by appeal, the records of the justice, as well as the writ, service, pleadings, &c., are always to be treated in the supreme court as part of the case, though not specially referred to in the bill of exceptions. *Whedock v. Sears*, 559.

See COSTS 2, 7; CRIMINAL LAW 2; PRACTICE 7, 8.

EXECUTION.

1. Where the term of court, at which a party recovers final judgment, ends on Saturday, Monday is the first day on which the party is entitled to take out execution; and that day is to be excluded in the computation of the thirty days, within which property, attached on the original writ, must be demanded of the attaching officer by the officer holding the execution, in order to charge the property. *Allen v. Carty et al.*, 65.
2. The certificate of a justice of the peace, of the time when an execution and return of levy upon real estate was recorded in his office, is but *prima facie* evidence; and parol evidence is admissible, to show the true time when such record was made. *Morton et al. v. Edwin*, 77.
3. The levy of an execution upon real estate is a proceeding *in invitum*; the requirements of the statute are in the nature of a condition precedent, and must have been strictly complied with, in order to pass the title. *Ib.*
4. *Quare*, Whether it is essential to the passing of the title, that the execution and return must have been recorded at length in the office of the town clerk and of the clerk, or justice of the peace, from whence it issued, within the life of the execution? *Ib.*
5. But at all events the creditor cannot sustain an action of ejectment against the debtor founded upon the levy, unless the execution and return have been recorded at length, in both offices, prior to the commencement of the action. *Ib.*

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6. If the levy of an execution upon land is valid as against the debtor, it is valid as against subsequent attaching creditors. *Adm'r of Barnard v. Russell*, 324.
 7. Where, in the description of land levied upon, the starting point was stated to be in the north line of a certain highway and at the *north-west* corner of a certain house lot, and it appeared, that the house lot lay on the north side of the same highway and that its *south-west* corner was the only point where it adjoined the road and the land levied upon, it was held, that the court would intend that the word "north-west" was written, by mere clerical error, for "south-west," and that the mistake was not fatal to the levy. *Ib.*
 8. Where, in such description, the course and distance of a line are given and also a known monument as its *terminus*, the monument must govern; and it makes no difference, in this respect, whether the error in the course given is a variation of one degree, or of ninety degrees. *Ib.*
 9. All the material facts, necessary to show that the law has been complied with in the levy of an execution upon real estate, should appear by the officer's return. *Sleeper v. Newbury Seminary et al.*, 451.
 10. Therefore, where it appeared from an officer's return of such levy, that the whole of the estate described in the return belonged to the debtor in the execution, and that the execution was levied upon an undivided portion of such estate, and it was not stated in the return, that, in the opinion of the appraisers, the estate could not be divided without injury, the levy was held invalid to pass the title. *Ib.*
 11. Where an officer attaches personal property upon three writs of attachment, and at the same time levies an execution upon the same property, subject to the attachment upon the three writs, and takes the property into his possession, and the executions obtained upon the three writs first served are placed in the hands of another officer, leaving the fourth execution in the hands of the first officer, this gives such other officer no right to take the property from the possession of the first officer. *Burroughs v. Wright et al.*, 510.
 12. And it makes no difference, in such case, that the second officer, upon receiving the executions, demanded the property of the first officer, and he consented that it might be taken, if such consent were in fact revoked, before it was acted upon by the second officer. *Ib.*
 13. And if, after such consent is revoked, the second officer take the property into his possession, he has no right to retain it, as against the first officer; and the first officer will not become a trespasser by the retaking the property, to be disposed of upon the execution still retained by him;—nor will he become a trespasser, as to the second officer, by any subsequent irregularity in his proceedings upon that execution. *Ib.*
 14. If an execution debtor consent that his property may be sold upon the execution without advertisement, the sale is valid, and is so far an official sale, that the officer's return upon the execution is *prima facie* evidence in favor of the officer and of those who acted under him. *Ib.*
 15. An execution issued by a justice of the peace, which is renewed by erasing

the date and inserting a new date, after it has been delivered to an officer for collection, but before service has been made, and within its life, is not thereby rendered absolutely void, so that it may be set aside on *audita querela*. *Sawyer v. Doane*, 598.

16. The statute,—Rev. St. c. 42; § 43,—which authorizes the supreme court, upon petition, to vacate an irregular levy of execution upon real estate, is not restricted to defects which are apparent upon the face of the levy,—but extends to a case, where the officer intending to levy upon the life estate of the debtor in land, subject to a mortgage, by mistake caused the fee simple to be appraised, and levied upon the entire equity of redemption. *Hyde v. Taylor et al.*, 599.
17. That statute is remedial, and, as such, should receive a liberal construction, so as to advance the remedy. *Ib.*

See CHANCERY 28, 29; *SHERIFF* 2, 3, 11; *TRESPASS* 2.

EXECUTORS AND ADMINISTRATORS, *See DEED* 13, 16; *EVIDENCE* 17, 20.

FEES, *See SHERIFF* 11; *TAXES* 14.

FORCIBLE ENTRY AND DETAINER, *See RECOGNIZANCE* 2.

FOREIGN ATTACHMENT, *See TRUSTEE PROCESS*.

FOREIGN LAWS, *See EVIDENCE*.

FORGERY, *See CRIMINAL LAW* 5, 6.

FRAUD.

1. While the plaintiff was attending, as a physician, upon the father and mother of the defendant, under a contract with the father, that, "if there was no cure there should be no pay," the defendant executed to the plaintiff a writing, by which he agreed to be "holden" to the plaintiff "for the payment of his bill for medicine and attendance" upon his father and mother. And it was held, that the undertaking of the defendant was collateral, merely, to the contract between his father and the plaintiff. *Smith v. Hyde*, 54.
 2. If the liability of the defendant is only collateral to that of another person, the action on book account cannot be sustained against him. *Ib.*
 3. This court do not regard an absolute conveyance of property, with a secret clause of defeasance, written or verbal, as a conclusive badge of fraud; but such conveyance is open to suspicion. *Smith v. Onion et al.*, 427.
- See CHANCERY* 54; *PROMISSORY NOTES* 3; *SALE* 4-6; *TRUSTEE PROCESS* 7, 16.

FRAUDULENT CONVEYANCE, *See ACTIONS PENAL* 5, 6.

GUARANTY.

1. While the plaintiff was attending, as a physician, upon the father and mother of the defendant, under a contract with the father, that, "if there was no cure there should be no pay," the defendant executed to the plaintiff a writing, by which he agreed to be "holden" to the plaintiff "for the payment of his bill for medicine and attendance" upon his father and mother. And it was held, that the undertaking of the defendant was collateral, merely, to the contract between his father and the plaintiff. *Smith v. Hyde*, 54.
2. In such case parol evidence is admissible to prove the terms of the original agreement between the plaintiff and the principal debtor, and to show that the plaintiff has never complied with the terms, so as to acquire a right of action against the principal debtor;—and if this fact be established, the plaintiff can maintain no action upon the guaranty. *Ib.*

GUARDIAN.

1. A guardian, who contracts with another person to support his ward, and does not attempt to limit the right of such person to the estate of the ward for indemnity, is himself personally liable upon such contract. *Hutchinson v. Hutchinson*, 437.
2. In this case the defendant, who was guardian of a person *non compos mentis*, contracted with the plaintiff to board the ward at \$1,50 per week; but no time was fixed for the duration of the contract; at the end of a year the plaintiff informed the defendant, that he would not board the ward longer for less than \$2,00 per week, and that he must take the ward away; the defendant attempted to remove the ward, but he was unwilling to leave; but the plaintiff still insisted that the defendant should remove the ward, unless he would pay \$2,00 per week for his board; the defendant made no direct promise to allow more than \$1,50 per week, but neglected to take the ward away; and it was held, that it must be taken that the defendant acquiesced in the additional price claimed by the plaintiff, and that he was liable therefor. *Ib.*
3. But, it appearing that the plaintiff had never given notice to the defendant, that he should charge more than \$2,00 per week for keeping the ward, it was held, that he was not entitled to charge the defendant for extra services about the ward, such as repairing bedding and clothing, extra washing, care when sick, and the trouble and expense of his burial. *Ib.*

HIGHWAYS.

1. When the selectmen of a town lay out a highway, the town are entitled to the whole period, to the time when the road is ordered to be opened for work, to arrange and settle the question of damages with the land owners; and a land owner cannot, previous to that time, petition a justice of the peace, under the statute, to appoint commissioners to appraise the damage sustained by him. *Tunbridge v. Tarbell*, 453.

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2. It is competent for the selectmen of a town and the owner of land, through which the selectmen have laid a highway, to settle the question of damages by a reference, pursuant to the provisions of the statute, at any time after the survey of the road, although the survey may not, at the time, have been recorded; and an award by the referees will preclude the land owner from bringing a petition for the appointment of commissioners to appraise his damages. *Ib.*
 3. It has been often determined by this court, in actions against towns for injuries occasioned by the insufficiency of highways, that whether the plaintiff conducted with care and prudence, whether the road was in a sufficient state of repair, and whether the accident occurred mainly through the insufficiency of the road and entirely without fault on the part of the plaintiff are questions of fact, ordinarily mixed, however, with questions of law, requiring comment by the court. *Rice v. Montpelier*, 470.
 4. But how far towns are bound to clear away obstructions, natural, or artificial, from that portion of the highway exterior to the wrought way, how far they shall be held responsible for accidents occurring in travelling over this lateral space, either voluntarily, or on account of difficulties existing in the ordinary track, or for such as may occur in consequence of diverging into the neighboring field from a real or supposed necessity, or for such as may arise in attempting to pass a bridge, obviously unsafe, or dangerous, or in fording a stream in such case, are mainly questions of law, calling for special instructions from the court. *Ib.*
 5. In this case it appeared, that the plaintiff was travelling upon the highway in the village of Montpelier, that the travelled path was from twenty to thirty feet wide, that in the ditch, and three feet from the outer edge of the travelled path, and about five or six feet from the fence, a hole had been dug about three feet square and two feet deep,—of which the highway surveyor had notice,—that there was nothing between the hole and the fence but an elevated sidewalk, that there was some snow upon the sides of the road, but none in the travelled path, that sleighs had been driven in the ditch and had made a path there upon the snow at the place where the hole was dug, and that the plaintiff was passing along the highway, in a dark night, with a horse and sleigh, and run into the hole, whereby his horse and sleigh were injured; and it was held, that the jury should have been instructed, that, if they found that the plaintiff diverged from the travelled road without necessity, but merely for the purpose of having the benefit of snow, or that the horse took the same direction from a natural instinct, or from inability to see the road, on account of the darkness, the town should not be held responsible for the consequences which ensued. *Ib.*
 6. A petition for a highway through several towns, which omits to state that the petitioners are freeholders of the towns and vicinity through which they desire a road, may be amended, by consent of the petitioners, if the facts will warrant the averment. *Howe et al. v. Jamaica et al.*, 607.

See Jurisdiction 4.

HUSBAND AND WIFE.

1. At law, as a general rule, a married woman can neither sue, nor be sued, unless in connection with her husband. But in chancery, whenever the interests of the two are conflicting, the wife is allowed to bring a suit against her husband, and the husband against the wife, as if they were sole and unmarried. *Porter et al. v. Bank of Rutland et al.*, 410.
2. The husband is competent to act as trustee of his wife's separate property as well as any other person, if duly appointed; and he will sometimes be regarded as such, with a view to the protection of the wife's separate property against his creditors, without any appointment whatever. *Ib.*
3. Where it appeared, that the father of a married woman intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and he subsequently enclosed in a letter to her husband, a check for \$1000, payable to his daughter, or bearer, and expressed in the letter a wish that the money might be so invested as would be for the mutual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them, and it appeared that she then had three children, the court considered the evidence sufficient to justify them in finding, that the intention of the father was, to set apart this fund for the exclusive benefit of his daughter and her children, and to place it under the control of her husband, as her trustee. *Ib.*
4. A married woman can only be admitted as a witness in a case, when her husband would be a competent witness in the same case. *Abbott, Adm'r, v. Clark*, 444.
5. Temporary alimony not allowed to the wife, to enable her to prepare her defence to a libel for divorce, preferred by the husband. *Hazen v. Hazen*, 603.

See CHANCERY 22.

ILLEGAL CONTRACT, &c CONTRACT; POOR 21.

INDEBITATUS ASSUMPSIT, See ASSUMPSIT.

INDICTMENT, See CRIMINAL LAW.

INFANT.

1. Infancy is a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse, whether such action is in form *ex delicto*, or *ex contractu*. *Morrill v. Aden*, 505.
2. But the infant must either affirm or avoid the entire contract; and if he choose to affirm it, after he becomes of age, by bringing an action upon the notes given upon consideration of the sale, he cannot, upon his plea of infancy, preclude the defendant from taking advantage of the false warranty, in any proper manner, as a defence. *Ib.*

See POOR 9.

INTEREST, See Poor 20.**JAIL BOND.**

1. Under the plea of *non est factum*, in an action of debt upon a jail bond, the defendants may avail themselves of any ground of defence, showing that there never was any legal validity to the bond. *Downer et al. v. Dana et al.*, 338.
2. If the jail limits, in a county, are capable of being ascertained by a resort to the records of the county court, as is ordinarily the case, then such resort must be had; if not, proof of general understanding and acquiescence of all concerned, for thirty years, and probably for fifteen years, in certain recognized and well defined boundaries is equivalent to record proof. *Ib.*
3. In this case the county court charged the jury, that if certain territory had been, for thirty years, regarded by the community, and adopted and acquiesced in by all who had any interest in learning the extent of the jail limits, as being a part of the jail limits, and the fact of its being part of the jail limits had never, during that time, been questioned or disputed, although it did not appear to have been established by the court, in pursuance of the statute, it would now be regarded as within the jail limits, and a prisoner's going upon that territory would not be a breach of his jail bond; and it was held, that there was no error in the charge. *Ib.*
4. Where it appeared, that the jail limits were regularly laid out and established by the county court, and some rods exterior to one of the lines a tree stood, marked plainly with the letters G. L., indicating that it was on the line of the gaol limits, but it did not appear by whom or when the tree was thus marked, although it was less than thirty years, but more than fifteen years, before the alleged escape, and it appeared, that, from the time it was so marked, the prisoners upon the limits had been accustomed to go to that tree, and treat it as one of the gaol limits, the going to this tree, by a prisoner on the limits, was held, by a majority of the court, not to be a breach of his jail bond. *Prince v. Burnham et al.*, Chittenden Co., 1839, cited by *DAVIS*, J. *Ib.*
5. Where certain territory had been, for the space of thirty years, understood to be part of the jail limits of a county, and had been acquiesced in as such, by all concerned, during that time, it was held, that it must be treated as in fact part of the jail limits, and that a prisoner's going thereon would be no breach of his bond,—as decided in *Downer et al. v. Dana et al.*, ante, page 338. *Perkins v. Dana et al.*, 589.

See NEW TRIAL 1, 2.

JAIL LIMITS, See JAIL BOND.**JUDGMENT.**

1. Where property, attached upon a writ, is bailed to a receiver, a judgment, recovered by the creditor against the receiver, upon the receipt, becomes a

mere dead letter upon the payment of the debt to the creditor. Such judgment is merely collateral to the debt, and is for the benefit and security of the sheriff and ceases to have force when his liability to the debtor and creditor is discharged. *Paddock v. Palmer et al.*, 591.

See CHANCERY 17, 41, 43, 51; *ESTOPPEL* 2; *PROCES* 1; *PROMISSORY NOTES* 7, 8; *REVIEW* 1.

JURISDICTION.

1. If the holder of a promissory note, on which there is due more than \$100, indorse upon it, as payment, a sum which will reduce the amount apparently due upon the note to a sum less than \$100, and do this without any payment being in fact made by the defendant, and for the mere purpose of bringing the note within the jurisdiction of a justice of the peace, and then commence an action upon the note before a justice, the action will not, on appeal, be dismissed by the county court, for want of jurisdiction in the justice. *Herron v. Campbell*, 23.
2. The term "land," as used in the exception to the statute giving jurisdiction to justices of the peace, is sufficiently comprehensive to include a right of way over the real estate of another, whether held by the public, or an individual. *Whitman v. Pownal*, 223.
3. But a justice of the peace is not excluded from taking jurisdiction of an action, merely because, under the plea of the general issue, or a plea in bar, the title of land may be drawn into controversy,—but only when the action necessarily involves such an inquiry, as ejectment, and other real actions, or when, by the course of pleading, the title to land is actually contested. *Ib.*
4. A justice of the peace has jurisdiction of an action of trespass on the case, brought against a town to recover for injuries alleged to have been sustained by reason of the insufficiency of a highway which the town were bound to maintain, where the damages claimed are less than one hundred dollars, unless the defendants interpose such a plea, as directly puts in issue the right of way. *Ib.*

JURY, *See* VT. CENTRAL RAIL ROAD CO. 1-4.

JUSTICE OF THE PEACE, *See* ACTIONS PENAL 3, 4; COUNTY COURT 1, 2; JURISDICTION 2-4; RECORD 3.

LANDLORD AND TENANT, *See* ADVERSE POSSESSION 1, 3; EJECTMENT 3, 4; MANURE 2, 3; TRESPASS 3, 4.

LAND TAX, *See* TAXES.

LIMITATIONS.

1. Where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact, that within six years the defendant made a general payment to the plaintiff on account of some one, or more, of the notes, or of the indebtedness mani-

fested by them, it was held, that a promise of farther payment must be implied. It is not essential, that the defendant should have recollect the giving of the notes, at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it. *Ayer v. Hawkins*, 26.

2. If a debtor, owing several demands to his creditor, make a general payment, and neglect to direct its application, the right of designation belongs to the creditor; yet he must make an application, to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held, that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent, in date, to the others, and that the effect would be to take the note, upon which the application was made, out of the statute of limitations,—but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute. *Ib.*
3. One of two joint contractors, having paid the whole debt, may sustain his action for contribution against his co-contractor, notwithstanding the statute of limitations had run upon the claim at the time the payment was made. *Mills v. Hyde*, 59.
4. The saving of the tenth section of the statute of limitations of 1797, which provides, that, when the debtor, at the time the cause of action accrued, was without this state, the suit may be commenced within six years after his return into this state, extends to a case where both parties are resident citizens of another state, and the debtor is within this state for a temporary purpose, merely, at the time the writ is served upon him. *Graves et al. v. Weeks*, 178.
5. And such action will be sustained in this state, although the cause of action may be barred, at the commencement of the suit, by the statute of limitations of the state of which both parties are resident citizens. *Ib.*
6. A promise to pay, as soon as the debtor can, a note barred by the statute of limitations is sufficient to take it out of the statute; it is not necessary for the plaintiff to show that the defendant is of sufficient ability to pay the note, in order to entitle him to recover. *Cumming et al. v. Gasset*, 308.
7. The statute of limitations does not begin to run upon a demand, until the principal, or at least some separate and distinct portion of the principal, becomes due and payable,—and then only upon such distinct and separate portion. The interest, accruing from year to year, is not thus separated from the principal demand, and consequently the statute of limitations does not run upon it, until the principal is barred by the statute. *Grafton Bank v. Doe et al.*, 463.

See CHANCERY 47, 48.

MANURE.

1. The manure of animals, made upon a farm, whether spread about the barn yard, or lying in piles at the stable windows, or lying in the stables, where it

- has been suffered to accumulate, will pass by a deed of the freehold, as appurtenant to it. *Wetherbee v. Ellison*, 379.
2. And the tenant will have no right to remove the manure, notwithstanding he owned the crops from which it was made, if it appear that the crops were the product of the farm; in such case the rules of good husbandry require, that the manure should be expended upon the farm. *Ib.*
 3. And where the defendant, who was in the occupancy of the farm, as tenant, at the time of the conveyance of the farm by the owner of the fee to the plaintiff, subsequent to that conveyance removed from the farm the manure which he had before suffered to accumulate in the stable, it was held, that, even upon the supposition, that, as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet, in the absence of any notice, either actual, or constructive, to the plaintiff, of this right, the defendant's intention to remove it, at the time he piled it in the stable, could not affect the plaintiff's right to it, unless that intention was manifested by some act, sufficient to put the plaintiff upon inquiry at the time of his purchase. *Ib.*

MORTGAGE.

1. A contract between a mortgagee and mortgagor, in reference to the purchase by the mortgagee of the equity of redemption, will not be positively disregarded in a court of equity; but such contracts are viewed suspiciously, and the conduct of the mortgagee will be watched very narrowly. *Hyndman v. Hyndman*, 9.
2. In this case the orator, being indebted to the defendant, executed to him an absolute deed of his farm, taking back a writing of defeasance. The orator received from the defendant farther advances, until the sum due amounted to about \$800. The parties then agreed, that the defendant should have the farm for \$800; and the defendant gave his note to the orator for the difference between that sum and the amount due upon the mortgage, and the orator surrendered his writing of defeasance;—but it was agreed verbally between them, that the defendant should sell the farm and the orator should have what he received over \$800, after paying defendant for his time and trouble. And it was held, that the contract must, in equity, be still considered as a mortgage, with a power of sale in the mortgagee, and that the orator should be allowed to redeem the premises upon a bill brought for that purpose. *Ib.*
3. And the orator was allowed to redeem, notwithstanding the defendant had, in pursuance of his power of sale, caused the premises to be sold at auction and became himself the purchaser. *Ib.*
4. Where the note secured by a mortgage is paid in part, and a new note is given for the balance, and the parties agree that the new note shall be substituted in place of the mortgage note, the mortgage will still stand as security for the payment of the latter note. *Dunshier v. Parmelec, Adm'r*, 172.
5. After condition broken the mortgagee becomes, at law, the absolute owner of the estate and is entitled to the immediate possession. *Lull v. Matthews*, 322.

6. Where, after condition broken, and after the mortgagee had obtained a decree of foreclosure, but before the time for redemption had expired, the mortgagor cut wood upon the mortgaged premises, and the wood, while it remained upon the premises, was attached by a creditor of the mortgagor and sold at sheriff's sale to the defendant, and the wood remained upon the premises until after the time for redemption had expired, and the mortgagee took possession of the premises and forbid the defendant's removing the wood, and sold and used part of the wood himself, it was held, that the mortgagor, when he cut the wood, was a wrong doer and acquired no title to the wood, as against the mortgagee, and that the defendant acquired no title to the wood by his purchase and was not liable to pay the price which he had agreed to give for it. *Ib.*
7. The neglect of the holder of a promissory note, secured by mortgage, to present the note for allowance by the commissioners appointed to receive and adjust claims against the estate of the deceased maker, does not preclude him from afterwards enforcing the mortgage security; it merely precludes him from claiming any dividend or portion of the assets of the estate in the hands of the administrator. *Grafton Bank v. Doe et al.*, 468.
8. Where the plaintiffs in an action of ejectment, who were partners, offered in evidence a mortgage deed, executed by the defendant, and conveying the demanded premises to the plaintiffs by the name of their style of partnership, which consisted of the surnames of the partners, omitting their christian names entirely and describing their place of residence, it was held, that evidence was properly admissible, to show that the plaintiffs were, at the time the mortgage was executed, doing business, as partners, at that place, and that the defendant executed to them, by the name of their firm, the promissory note described in the condition of the mortgage, and that, with this evidence, the mortgage deed was admissible, and, with proof of defendant's possession of the premises, entitled the plaintiff to a recovery. *Morse et al. v. Carpenter*, 618.

See CHANCERY 5, 6, 28, 29; *CORPORATION* 6-11; *DEED* 6, 7.

NEW TRIAL.

1. A new trial will not be granted on petition of the plaintiff, in an action upon a jail bond, unless he failed in his former trial through some fraud of the defendant. *Perkins v. Dana et al.*, 589.
2. In this case, which was an action upon a jail bond, the plaintiff, on trial, gave evidence to prove ten distinct breaches of the bond, all committed in open day light, and in the most public manner; but he failed, upon this evidence, to obtain a verdict; and the supreme court refused to grant him a new trial, upon a petition setting forth, that, since the former trial, he had discovered evidence of two other breaches, committed in similar manner. *Ib.*

NONSUIT, &c PRACTICE 1.

NOTICE, *See EVIDENCE* 19; *PLEADING* 9; *SHERIFF* 6; *TRUSTEE PROCESS* 12; *TRUSTS & TRUSTEES* 5-7.

OFFICER, *See* SHERIFF.

OFFSET, *See* SET OFF.

ORDER OF REMOVAL, *See* POOR.

PARENT & CHILD, *See* POOR 3-5, 12.

PARTIES, *See* Book ACCOUNT 13, 14; CHANCERY 38, 39; EVIDENCE 16, 17; SHERIFF 5-10.

PARTNERSHIP.

1. In equity the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, notwithstanding the separate creditors may have first attached those assets. *Washburn et al. v. Bank of Bellows Falls et al.*, 278.
2. In asserting this right the partnership creditors prevail over the separate creditors by virtue of a lien, which each partner is supposed to have, by implied contract, upon all the partnership effects, until all the partnership debts are paid.
3. It is sufficient for the partnership creditors, in such case, to make out a *prima facie* case of insolvency; and, *per REDFIELD*, J., if the defendants desire to have an account taken of the partnership dealings, so as to determine the exact state of the liabilities and assets, they must file a cross bill for that purpose. *Ib.*
4. The partnership creditors, having made separate successive attachments of the partnership property, and having resorted to a court of equity for relief against the attachments of the separate creditors, must share the assets *pro rata*, and not in the order of their attachment. *Ib.*
5. At law both separate and joint creditors of a partnership may attach either separate or joint property, and sell it upon execution in satisfaction of their judgments without regard to the equities of the debtors. *Bardwell v. Perry et al.*, 292.
6. But in equity the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; and, while the partnership continues, this equitable lien, existing for the benefit and security of the separate partners, may be reached in a court of equity by the creditors of the firm, for the purpose of securing to themselves a preference over the separate creditors. *Ib.*
7. A partnership contract imposes precisely the same obligation upon each separate partner, that a sole and separate contract does; and there is no express or implied contract, resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively. All that the separate creditors can require, in equity, is, that the partnership creditors must first exhaust the partnership funds, before resorting to the separate effects of the individual partners; and beyond this both sets of creditors stand precisely equal, both at law and in equity. *Ib.*

See ACCOUNT 4; CHANCERY 36, 37; PROMISSORY NOTES 1.

PAUPER, *See* Poor.**PAYMENT.**

1. If a debtor, owing several demands to his creditor, make a general payment, and neglect to direct its application, the right of designation belongs to the creditor; yet he must make an application, to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held, that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent, in date, to the others, and that the effect would be to take the note, upon which the application was made, out of the statutes of limitations,—but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute. *Ayer v. Hawkin*, 26.
2. Presumption of payment of an account, arising from lapse of time, is matter of fact, of which advantage must be taken before the auditor. *Graves et al. v. Weeks*, 178.
3. Courts are never at liberty to presume payment from *mere lapse* of time, in any period less than that which is fixed by the statute of limitations. *Grafton Bank v. Doe et al.*, 463.

See CHANCERY 40, 41, 44, 47, 48.

PENAL ACTIONS, *See* ACTIONS PENAL.**PENALTY, *See* CHANCERY 53.****PETITION, *See* APPEAL 1; COUNTY COURT 1, 2; HIGHWAYS 6.****PLEADING.**

1. The declaration in favor of a subsequent indorsee of a promissory note against the first indorser will be sufficient on demurrer, although it do not allege, that, by the terms of the defendant's indorsement, the note was ordered to be paid to his immediate indorsee, or *his order*. *Hedges v. Adams*, 74.
2. In an action of trespass, where the declaration contains several counts, a plea, which commences and concludes in bar of the action generally, and the obvious and natural import of the language of which should be understood in a plural and distributive sense, as applying to the different occasions on which the trespasses are charged, must be taken as a plea to the whole declaration. *Hathaway v. Rice*, 102.
3. A plea to the whole declaration, to be sufficient, must appear to contain an answer to all that is alleged as the direct ground and gist of the action, and such answer must be valid and sufficient in law. *Ib.*

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4. Matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by the defendant, on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of. *Ib.*
 5. But a declaration, which charges the defendant with having struck the plaintiff a great many violent blows with a club, and with a raw hide, and with his fist, and with having, with great violence, shaken the plaintiff and pulled him about, and with having thrown down the plaintiff and then harshly and brutally kicked him and struck him other violent blows, and with having wounded him, and torn his clothes, exhibits a mere succession of acts of direct trespass, all remediable by an action of the same class, and each requiring some complete justification, or excuse, in the plea. *Ib.*
 6. But a plea to such declaration, which professes to answer the "assaulting, beating and ill treating," using the explanatory words, "as in the declaration mentioned," will be considered as co-extensive with the alleged cause of action. *Ib.*
 7. But it was held, that a plea to a declaration alleging such acts of trespass, which averred, merely, that the defendant was a school master and the plaintiff was his scholar, and that the plaintiff was insolent and refused to obey the reasonable commands of the defendant, and thereupon the defendant moderately chastised him, and which set forth no acts on the part of the plaintiff requiring excessive severity on the part of the defendant, such as resistance by the plaintiff,—did not disclose a sufficient justification in law, for the acts alleged in the declaration. *Ib.*
 8. To entitle the plaintiff to recover upon an award, which provides that the defendant shall pay the "taxable costs" of a suit which had been pending in court, he must aver in his declaration that the *taxable costs* amounted to a certain specified sum, of which the defendant had notice before suit brought; and if this averment is omitted, the declaration is bad upon demurrer. *Wright v. Smith*, 110.
 9. The general rule of pleading is, that, when matter is more peculiarly within the knowledge of one of the parties than of the other, notice is necessary, although the terms of the contract do not require it. *Ib.*
 10. A defective conclusion of a replication can only be reached by special demurrer. *Hooker v. Smith et al.*, 151.
 11. Where a declaration contains several counts, the court, on demurrer to the replication, will only notice defects in those counts to which the replication applies. *Ib.*
 12. If an attorney make a writ and indorse his name upon it as attorney for the plaintiff, and also sign the writ as justice of the peace, and, for want of a proper officer seasonably to be had, direct the writ to an indifferent person, by whom it is served, the process will abate. *Ingraham v. Leland et al.*, 304.

13. And where it is alleged, in such plea, that the writ was served by the person thus specially authorized, and the writ and return are referred to in the plea, it is sufficient, although it is not alleged, that the writ was not served by any other person. *Ib.*
14. There is no distinction, in this state, between being "of counsel" and "attorney" in a case; and therefore the plea in abatement is sufficient, in such case, if it allege, that the magistrate, who signed the writ, "was then and there an attorney of record in said suit." *Ib.*
15. If, to a plea of justification under a rate bill and warrant, the plaintiff reply *de injuria &c.*, and no objection is taken to the replication, the defendant must prove every material allegation in his plea. *Downer v. Woodbury*, 829.
16. Under the plea of *non est factum*, in an action of debt upon a jail bond, the defendants may avail themselves of any ground of defence, showing that there never was any legal validity to the bond. *Downer et al. v. Dana et al.*, 888.
17. Whenever new matter is introduced in any of the pleadings in a suit, the plea should conclude with a verification. *Joslyn v. Tracy*, 569.
18. Where the defendant, in an action of trespass, justifies the taking of the property by virtue of a rate bill and warrant, and the plaintiff replies a tender of the amount of the tax and interest, a rejoinder, that the defendant was entitled to and claimed travelling fees, in addition to the tax and interest, and that therefore the tender was insufficient, should conclude with a verification. *Ib.*
19. Evidence adapted to prove the material and substantial part of the issue formed by the pleadings is admissible, although the pleading, on the part of the party offering the evidence, may be so defective, that judgment would be arrested after a verdict; but this does not entitle the party to prove every immaterial circumstance, that may happen to be embraced by the issue. *Drew v. Chamberlin et al.*, 573.

See ACCOUNT 1-3; BOOK ACCOUNT 13, 14; ESTOPPEL 1; POOR 13; PROMISSORY NOTES 6; RECOGNIZANCE 2, 4; SHERIFF 10; TAXES 6-10; TRESPASS 7.

POOR.

1. Where a transient person is taken sick and is in need of relief, and the person, at whose house he is, gives notice to the overseers of the poor of the town in which he resides and requests them to provide for the pauper, and the overseers request him to do what is necessary, he may recover for his services and expenses, in taking care of the pauper, in an action on book account against the town. *Wolcott v. Wolcott*, 37.
2. The acts of a major part of the overseers of the poor, in this respect, are binding upon the town. *Ib.*
3. An order of removal of a pauper and his wife and "their four children" will not be quashed on motion, although it do not state the names of the children, nor allege that the children are minors. The court will rather intend that a

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- pauper's children, living with him as a part of his family, were dependent upon him as a parent and subject to his parental control, than that they were adult children and emancipated. *Burlington v. Essex*, 91.
4. At common law the settlement of an illegitimate child was at the place of his birth, unless fraud had been practised to occasion the birth to happen at that place, or the mother had been transported or conducted thither under legal authority;—and in this respect the rule of the common law, in this state, was not changed by the statute of 1801. *Ib.*
 5. And under the statute of 1817 the settlement of an illegitimate child, acquired by birth previous to the enactment of that statute, will not be changed by the mother's acquiring a new settlement by marriage, but only by the mother's acquiring a new settlement in her own right. *Ib.*
 6. In order to have gained a legal settlement in a town under that clause of the statute of 1817, which provided that a person should have a settlement, who should hold in the town, for two years, any one of several specified offices, it was not necessary, that the office should have been held for two years in succession. *Lincoln v. Warren*, 170.
 7. But it was essential to the acquiring a settlement under that provision, that the person should have a continuous residence in the town from the time he held the first office until the settlement was acquired. If he held the office the two years, but with an interval between, and during that interval resided out of the town for any period, the settlement would not have been acquired. *Ib.*
 8. Where a person, residing in Jamaica, purchased a tract of land in another part of the town, and partly cleared it, and, with the intention of building a house upon the land and residing in it as soon as it should be finished, removed, with his family and all of his effects, except a few articles of furniture of little value, or use, to the town of Londonderry, and resided there twenty nine days, having no intention of again living in the house which he had left in Jamaica, and intending to remain in Londonderry until his house should be finished which he was about building, and then removed again to Jamaica, it was held, that this was a change of domicil and interrupted his gaining a settlement in Jamaica by residence. *Jamaica v. Throsselhead*, 267.
 9. A settlement by seven year's residence, under the statute, can only be acquired by persons above the age of legal majority. No allowance can be made for any length of residence during infancy, though it may have been after emancipation. *Hartford v. Hartland*, 892.
 10. A removal from town, with the person's family and effects, and a residence for several months in another town, will interrupt the gaining a settlement by seven year's residence, notwithstanding the person may, at the time of removal, contemplate a return at some future, but indefinite, time. *Ib.*
 11. Whether a person was legally chargeable to a town, so as to entitle them to institute proceedings for his removal as a pauper, must depend upon the degree of his destitution and poverty at the time the proceedings were taken. *Ib.*
 12. In this case the paupers removed were a widow, who was sickly and subject

to fits, and her children, who were of tender age; and it appeared, that, previous to their removal, relief had been afforded to them by the town instituting the proceedings; and, it appearing that the widow had no property, nor interest in any property, except such as was subject to attachment, or was placed beyond her immediate control by reason of other liens, and except certain household furniture, which it did not appear was any more than sufficient to enable her to live comfortably with her children, it was held, that she must be considered as chargeable, and, as such, subject to removal. *Ib.*

13. Upon an appeal from an order of removal of a pauper, the question, whether the pauper had come to *reside* in the town procuring the order, within the meaning of the statute, may be presented by plea, as well as by motion to quash the proceedings. *Sutton v. Cabot*, 522.
14. There is nothing in the third section of chapter sixteen of the Revised Statutes, in relation to the removal of paupers, which authorizes the removal of a transient pauper. *Ib.*
15. In this case the pauper was an old lady, who had resided for several years with her son in Cabot. In December, 1844, she went to Sutton to visit her daughter, taking nothing with her but a change of raiment, and intending soon to return. In February, 1845, about the time she intended to return, she had a slight attack of sickness, which prevented her returning at that time. In April, 1845, the day before she was again expecting to return to Cabot, she had a more severe attack of sickness, which rendered it impossible for her to return; and in this state she remained until June 9, 1845, when application was made to the town of Sutton for aid in her support; and they maintained her from that time until her decease, which was in September, 1846. On the 22d of October, 1845, the town of Sutton procured an order of removal; and previous to that time there had been no change in the determination of the pauper to return to Cabot, except what resulted from the impracticability of such return. In September, 1845, her son, with whom she had resided in Cabot, lost his wife by death, and in November, 1845, he ceased to keep house and removed to Walden, where he boarded with his daughter;—and from this time there was no evidence that the pauper expected she should ever be able to leave Sutton. And it was held, that the pauper had not come to *reside* in Sutton, within the meaning of the statute, at the time the order was made, and that the defendants were entitled to a verdict. *Ib.*
16. Assumpait will lie upon the statute,—Rev. St. c. 16, § 6,—which provides, that where an order of removal is made, and the pauper cannot be removed on account of sickness, the town procuring the order to be made shall support the pauper until he can be removed, and may recover the expenses of sickness and removal from the town to which the pauper was ordered to remove, if such town shall neglect to make payment for fifteen days after notice. *Pawlet v. Sandgate*, 621.
17. Parol testimony is admissible, upon the trial of such action, to prove that

- the pauper was sick at the time the order of removal was made, and continued so, so that he could not be removed without endangering life, until the time of actual removal. *Ib.*
18. The plaintiffs, in such action, may recover for all such charges and expenses, as they are legally bound to pay at the time of the commencement of the suit, notwithstanding the accounts may not then have been in fact paid. *Ib.*
19. And the plaintiffs may recover a reasonable compensation for the keeping and support of the pauper, notwithstanding it appears that an appeal was taken by the defendants from the order of removal, and that the pauper was maintained by an individual under a contract made with him by the plaintiffs, by which, if that suit was determined against the plaintiffs, he was to have a reasonable compensation, to be determined by arbitration, but if it went in their favor, he was to receive, for his compensation, after this suit was terminated, such sum as the plaintiffs should recover of the defendants in this suit for that item. *Ib.*
20. In such action the plaintiffs are entitled to recover interest upon the amount of their claim after the expiration of fifteen days from the time the notice of their claim, required by the statute, was given to the defendants. *Ib.*
21. But the plaintiffs cannot recover, in such action, for services rendered by a physician, who attended upon the pauper during his sickness, under a contract with the plaintiffs, that, if the plaintiffs succeeded upon the appeal from the order of removal, he should have a reasonable compensation for his services, but that, if the plaintiffs failed in that suit, he should receive nothing, although it appear that the plaintiffs did succeed upon the appeal. *Ib.*
22. Nor can the plaintiffs recover for services rendered to the pauper by a physician, the amount of whose account was not stated, as a distinct item, in the notice of the claim given to the defendants, although it appears that the amount of that account was included in another item in the notice, but without any specific designation. *Ib.*
23. And where it appeared, that the plaintiffs had contracted with an individual to maintain their poor for one year, during the time which elapsed after the order and before the removal, and the person, at whose house the pauper was, contracted with an individual, that, if the appeal from the order of removal terminated against the plaintiffs, he would receive \$2.50 per week for the support of the pauper, provided there should be no extraordinary expenses, it was held, that the plaintiffs, for that year, could only recover of the defendants the price thus agreed upon. *Ib.*

POSSESSION.

1. Where A. conveyed to B. certain premises for the life of B. and his wife, reserving to himself the right to possess and cultivate the premises for the purpose of enabling him to perform certain covenants upon his part for the

support of B. and his wife, and B. subsequently recovered judgment in an action of ejectment against A. for a breach of those covenants, upon which no writ of possession was taken out, it was held, that the judgment terminated A's right to the possession of the premises, and that, if he still undertook to manage the farm, directly, or indirectly, without some new licensee, he did so as a wrong doer, and acquired thereby no right to the crops raised upon the farm, as against B., or the holder of B's title. *Adams v. Dunlees; Sergeant v. Adams et al.*, 382.

See BETTERMENTS 4, 5; SALE 4-6.

PRACTICE.

1. In this case, after judgment had been pronounced, affirming the judgment of the court below, which was in favor of the defendant, the judgment of affirmance, on motion, was not entered up, but the court, *pro forma*, reversed the judgment of the county court and suffered the plaintiff to become nonsuit. *Morton et al. v. Edwin*, 77.
2. Where papers, referred to in the bill of exceptions, and which were placed on file at the time the case was made up, have been destroyed, without the fault of the party, previous to the hearing in this court, he will not be allowed to supply the defect by means of *ex parte* affidavits, which had not been filed in the case. But *it would seem*, that affidavits would be received for this purpose, if taken with notice, or placed on file in season to allow the opposite party to file counter evidence. *Fish v. Field & Tr.*, 141.
3. Where the plaintiff recovered judgment in the court below, and the defendant has brought the case into this court by exceptions, the case will not be continued, on motion of the defendant, for the alleged reason that the debt has been attached by trustee process;—the case should, at all events, proceed, until the rights of the parties in this suit are finally ascertained. *Wilson v. Rutland & Addison Fire Ins. Co.*, 177.
4. The courts of this state are not bound to take judicial notice of the laws of another state; but they are to be made to appear to the court by evidence. *Territt v. Woodruff*, 182.
5. Although the county court may have submitted to the jury the determination of that which is properly a question of law, yet if the finding of the jury is in accordance with the views of this court as to the law, the verdict will not be disturbed. *Castleton v. Langdon*, 210.
6. The statute laws of another state, when relied upon as a defence to a contract upon the ground of its illegality, must be proved, upon the trial, like any other facts in the case, and cannot be supplied in the supreme court, by producing there the statute book of that state. *Adams v. Gay*, 358.
7. Where exceptions are taken by one party to the decision of the county court in accepting a report of auditors, judgment will be affirmed, unless it appear that it should be reversed upon those exceptions; but if reversed, the whole cause will be before the court, to render such judgment therein as the county court should have rendered; the other party may therefore, upon the hearing,

argue, if he choose, such questions as were decided against him by the county court, although he took no exceptions at the time. *Davis v. Partridge, Adm'r*, 481.

8. Where exceptions were taken to the decision of the county court, but execution was not stayed, and the excepting party gave notice to the opposite party, four days before the session of the supreme court, that he should not prosecute his exceptions, and now desired the court to order the case struck from the docket as a mis-entry, the court refused so to order, but held, that judgment must be affirmed, unless the party elected to be heard upon his exceptions. *Allen v. Hard*, 606.

See Book Account 8; *CHANCERY* 5-8, 30, 32, 46, 51, 52; *Costs* 5, 7;
DECLARATION IN OFFSETT 2; *Poor* 18; *REVIEW* 1;
TRUSTEE PROCESS 5, 7.

PRINCIPAL AND SURETY.

1. If one sign, or indorse, a note, as surety for several joint principals, and one of the principals dies, the surety, having paid the debt, may claim a dividend from the estate upon the entire debt, notwithstanding he may hold *collateral* security for his liability. Where the security is merely collateral, a court of equity will not compel its application, merely for the purpose of reducing a dividend, unless the debtor stands in the relation of a co-surety. *West v. Bank of Rutland et al.*, 403.

See TRUSTEE PROCESS 15.

PRISONER, *See JAIL BOND.*

PROBATE COURT.

1. Where a proceeding is commenced by an executor, in pursuance of the provisions of section seven of chapter forty-eight of the Revised Statutes, for the purpose of compelling the defendant to make a discovery, under oath, as to property of the estate in his hands, the case must be finished in the probate court, before an appeal can be taken from that court to the county court. An appeal from an order, made by the probate court in such case, that the defendant answer certain interrogatories propounded to him, is premature, and will be dismissed, on motion. *Kimball, Ex'r, v. Kimball*, 579.

See CHANCERY 17.

PROCESS.

1. A judgment is a contract, within the meaning of section sixty three of chapter twenty eight of the Revised Statutes; and an execution, obtained in an action of debt upon a judgment rendered since the first day of January, A. D. 1839, cannot legally issue against the body of the debtor. *Sawyer et al. v. Vilas*, 43.
2. Where *audita querela* was brought to set aside an execution in such case, and the case was tried in the court below upon a statement of facts, agreed to by the parties, and the original writ and execution against the complainants were

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- referred to and made part of the case, wherein the complainants were described as residing in this State, it was held, that this was sufficient to show, in the absence of all rebutting testimony, that they were resident citizens of the State, within the meaning of the statute, at the time the execution issued. *Ib.*
3. If the defendant in the *audita querela* would claim, that the execution issued upon an affidavit, within the *proviso* to the statute, he must show that fact affirmatively. *Ib.*
4. But where one summoned as a trustee was adjudged chargeable, subsequent to January 1, 1839, by reason of a note which he had executed to the principal debtor prior to that date, and the plaintiff in the trustee process commenced an action on the case against the trustee, pursuant to the statute, to recover from him the amount for which he was held chargeable, it was held, that the execution obtained in the latter suit was properly issued against the body of the trustee. *Clark v. Trombly et al.*, Franklin Co., 1845, cited by BENNETT, J. *Ib.*
5. That section of the Revised Statutes, [Rev. St. c. 11, sect. 26.] which provides, that "No sheriff, or deputy sheriff, shall be allowed to make any writ, declaration" &c., must be so construed as to include constables, also. The term "sheriff," as used in this section and several others in the same chapter, may be regarded as a generic, not a specific, term, comprehending the whole class of executive officers, whose duties are of like nature. *Winchell v. Pond*, 198.
6. A writ filled up by a constable is void, and will be dismissed by the county court on motion, although the case may have come to that court by appeal, and the defect may not have been seasonably taken advantage of by plea in abatement, and although the writ was filled up by the constable at the request of the attorney for the plaintiff and under his supervision. *Ib.*
7. The deciding whether, or not, a proper officer can seasonably be had to serve process, and giving authority to some person, not a public officer, to serve it, if the fact be found negatively, is a judicial act. *Ingraham v. Leland et al.*, 304.
8. If an attorney make a writ and indorse his name upon it as attorney for the plaintiff, and also sign the writ as justice of the peace, and, for want of a proper officer seasonably to be had, direct the writ to an indifferent person, by whom it is served, the process will abate. *Ib.*
9. And if the attorney, who makes the writ, signs it as justice of the peace and takes a recognizance for costs, this will be a judicial act, which will render the process abateable. *DAVIS, J.* *Ib.*
10. No authority to serve a process can be conferred upon one who has not power by statute for that purpose, without a judicial act of the magistrate who signs the process. *Dolbear v. Hancock*, 388.
11. Where a writ, returnable to the county court, was directed by the magistrate who signed it in these words,—"To any sheriff or constable in the state, or to E. K. Gladding, constable of Granville," omitting to state therein the statute reasons for making a special authorization, and the writ was served by Gladding out of the town of which he was constable, it was held, that the service made by him was void. *Ib.*

12. And the county court have no power to permit the magistrate, who signed the writ, to amend the direction, after the case has been entered in court, by inserting therein the statute reasons for making the authorization; and the affidavit of the magistrate, that he omitted the requisite matter by mistake, can have no effect. *Ib.*
13. Public ministerial officers must set forth, in their returns, the acts done by them, that the court may judge of their sufficiency. *Henry v. Tilson*, 447.

See Actions Penal 1-4.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. Where the plaintiff delivered property to W. Downer and H. Dana, and executed to them, by the name of Downer & Dana, a bill of sale of the property, in which he acknowledged receipt of payment by note, and the note which he received was, by Dana, signed "Downer & Dana," and it appeared in evidence, that there was in existence at that time, doing business, such a firm as "Downer & Dana," consisting of those two individuals, it was held, that the plaintiff could not recover on the note against another firm, of different style, consisting of the same Downer and Dana and a third person, notwithstanding it might appear, that the latter firm was also then doing business at the same place,—there being no testimony, tending, even, to prove that the latter firm had, at any time, done any act, which could have induced the plaintiff to believe, that Downer & Dana had ever been authorized to use their own name and style for the purposes of the other firm;—and that, upon this testimony, it was improperly left to the jury to find, whether the note was executed, and received by the plaintiff, as the note of the latter firm. *Miner v. Downer et al.*, 14.
2. There is no rule, requiring that a bill of exchange should be actually shown to the drawee, in order to a valid and binding acceptance;—it is enough, if, when applied to for acceptance, he is enabled, by seeing the bill, or otherwise, to give an intelligent answer. *Fisher v. Beckwith*, 31.
3. An acceptance of a bill of exchange is not a contract within the statute of frauds; it is rather an undertaking to pay the acceptor's debt to the drawer, than to pay a debt due from the drawer to the payee. *Ib.*
4. An acceptance of a bill of exchange, by parol, is not void for want of consideration, when it appears that there was then a debt due from the acceptor to the drawer, on account of which the bill was drawn. *Ib.*
5. And the contract between the acceptor and the payee, created by the acceptance, cannot be affected by any subsequent arrangement between the acceptor and the drawer. *Ib.*
6. Where a bill was drawn payable on demand, and the plaintiff alleged an acceptance according to its tenor, and it appeared, from the evidence, that the acceptor, upon being applied to for acceptance and payment, replied, that the drawer had told him all about it, that it was all right, and that he would pay it in a few days, it was held no variance. *Ib.*

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7. A judgment against one of two signers of a joint and several promissory note extinguishes the note as against him, but does not affect the liability of the other signer. *Sawyer v. White et ux.*, 40.
 8. And if the payee of such note indorse it in blank, and recover judgment, in the name of a third person, but for his own benefit, against one of the signers, and obtain part satisfaction, he may yet deliver the note to another third person, for the purpose of collecting the balance from the other signer, and such other person may, by virtue of the same indorsement in blank, sustain an action in his own name against such other signer. The indorsement may be regarded as the indorsement of two several notes; and the judgment against one signer, in the name of an indorsee for purposes of collection, only deprives the indorsement of effect as to that signer, but leaves it in force, as against the other. *Ib.*
 9. If a promissory note be made payable to A. B. or order, and A. B. indorse the note in these words, "Pay the contents of the within note to C. D.," the legal effect will be the same, as though the note were indorsed to C. D. or order, and the indorsee of C. D. may maintain an action against A. B. as indorser. *Hodges v. Adams*, 74.
 10. The declaration in favor of a subsequent indorsee of a promissory note against the first indorser will be sufficient on demurrer, although it do not allege, that, by the terms of the defendant's indorsement, the note was ordered to be paid to his immediate indorsee, or his order. *Ib.*
 11. A writing in these words,—"For value received of Cummings & Manning, or order, thirty dollars and eighty-three cents on demand and interest annually," signed by the defendant, is competent and sufficient evidence under a count for money had and received. *Cummings et al. v. Gassett*, 308.
 12. And it seems, that such writing would be sufficient evidence under a count declaring upon it as a promissory note in common form. *Ib.*
 13. A memorandum on the margin of such note, specifying certain items of property at certain sums, the sum total of which, as added together, was equal to the sum on the face of the note, cannot be treated as part of the note, for the purpose of showing that the consideration was other than money. *Ib.*

See CONTRACT 3-5, 16, 17; *CRIMINAL LAW* 6; *JURISDICTION* 1; *TRUSTEE* PROCESS 1.

RECEIPTOR, *See ATTACHMENT* 1-3; *CHANCERY* 52-54; *JUDGMENT* I.

RECOGNIZANCE.

1. Upon a *scire facias* on a recognizance, taken upon an appeal from a judgment of a justice of the peace upon a complaint for wilfully and without force holding over demised premises, founded upon the sixth section of the statute of February 27, 1797, and conditioned that the appellant should pay to the complainant all intervening damages, occasioned by his being delayed, with additional costs, in case the judgment should be affirmed, the

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- plaintiff is not entitled to recover, as intervening damages, the value of the rents and profits of the premises from the time the appeal was taken until the time judgment was affirmed and a writ of restitution obtained. *Dress v. Chamberlin et al.*, 573.
2. Where the declaration, in such case, alleged that the plaintiff had been deprived of the rents and profits of the premises in consequence of the appeal, and that these constituted intervening damages which he was entitled to recover, and also that additional costs were incurred, and the defendant, in his plea, averred that he had paid all the costs, and that no other intervening damages had accrued, except the enhanced costs, and that the amount of the costs was accepted by the plaintiff in full satisfaction and discharge of all damages, and the plaintiff, in his replication, traversed all these averments, except the payment of the costs, it was held, that the real issue involved was, whether, in addition to the costs, any damages to the plaintiff intervened between the appeal and the final judgment, and that, under this issue, the plaintiff was not entitled to prove the value of the rents and profits of the premises during that time. *Ib.*
 3. In *scire facias* upon a recognizance entered into for the prosecution of an appeal, a claim for additional costs depends upon mere matter of computation; and to this claim a tender may be pleaded;—but a claim for intervening damages, which must depend upon the loss the plaintiff may have sustained by the delay, in the failure of the collection of his debt, either in whole, or in part, by the change of circumstances of the debtor, is unliquidated, depending upon the finding of the jury; and to this claim a tender cannot be pleaded. *Green v. Shurliif et al.*, 592.
 4. Where the declaration, in such case, includes a claim for additional costs, and also for intervening damages, a plea of tender to the entire declaration is bad on general demurrer;—but, *per HALL, J.*, the defendant might, in such case, have pleaded a tender of the additional costs, and traversed the assignment of the breach for intervening damages. *Ib.*
 5. Where the plaintiff, in such case, claims to recover intervening damages, the defendants may show the real condition of the appellant's property, at the time final judgment was obtained against him in the suit appealed; and they may do this, notwithstanding the sheriff, to whom the execution, issued upon that judgment, was delivered for collection, returned thereon that he could find no property of the execution debtor. *Ib.*
 6. This court will not order security to be given, by way of recognizance, for costs in the case in the county court, either past, or future, nor for costs in this court, where the case came into this court upon exceptions. *Levermore v. Bond*, 607.

RECORD.

1. Although it is a general rule, that a record of court imports absolute verity and cannot be contradicted by parol evidence, yet this rule does not forbid the exercise of a revisory power, by a court of general jurisdiction, over its own records. *Mosseau v. Brigham*, 457.

2. This power is incident to the county court, in this state, as well as to the supreme court, and is properly exercised, when a judgment by default has been entered by mistake, or fraud. *Ib.*
3. But the revisory power of a justice of the peace has always been understood to be terminated by the expiration of two hours after the rendition of his judgment. *Ib.*

See DEED 6, 7; EVIDENCE 4, 5; EXECUTION 4, 5.

REFERENCE, *See HIGHWAYS 2.*

REPLEVIN, *See DEED 16.*

RETURN, *See ATTACHMENT 6; EXECUTION 9, 10, 14; PROCESS 13; RECOGNIZANCE 5; SHERIFF'S SALE 3.*

REVIEW.

1. Where, in an action of tort against several defendants, the plaintiff, on trial, voluntarily entered judgment in favor of one of the defendants and then called that defendant as a witness, and he testified, and a verdict was returned in favor of the other defendants, and thereupon the plaintiff entered a review of the case as to all the defendants, and, at the next term, the defendant, in whose favor judgment was voluntarily entered, moved to set aside the review as to himself, it was held, that there was no error in the county court, in overruling the motion. *Lyndon v. Cook*, 35.

See CHANCERY 10, 12.

SALE.

1. The purchaser of property at sheriff's sale, whether upon *mesne* process, or execution, acquires no greater title to the property than the debtor possessed. *Lull v. Matthews*, 322.
2. Where a sale of personal property is absolute, and there is no fraud, the vendee cannot compel the vendor to receive back the article, if it proves deficient in quality; but he must resort to his action upon the warranty, if there were one. *West v. Cutting*, 536.
3. Where the defendant sold to the plaintiff a quantity of tea, which proved not to be good, and the plaintiff returned the tea to the defendant, who received it, and said that he should have some good tea soon and would replace it, to which the plaintiff assented, it was held, that this did not prove an absolute contract of rescinding, which would make the defendant debtor to the plaintiff, either for the money, or for the tea, unless called for; and that it imported no obligation, on the part of the defendant, to carry the tea to the plaintiff. *Ib.*
4. The cases, where it has been held that there was a sufficient change of possession of personal property, after sale, notwithstanding acts of intermeddling with the property by the vendor, which might amount to a seeming joint possession with the purchaser, are cases where, nevertheless, the purchaser alone

had control and was the visible head and conductor of the business, in which the property was used, or employed. But where the vendor is the sole conductor of the business, and his possession and use of the property is not interrupted, the sale will be void as against creditors, notwithstanding the purchaser may own the farm upon which the property is used after the sale, and may live upon it with the vendor. *Mills v. Warner*, 609.

5. Where the purchaser of personal property had exclusive possession of the property for three or four weeks after the sale, and then the property went into the possession of the vendor and was used by him permanently in his own business it was held, that the sale was void, as against a creditor of the vendor, who subsequently attached the property while thus in the possession of the vendor. *Ib.*
6. And where a portion of the property sold in such case, and thus possessed by the vendor after the sale, consisted of a horse, and the vendor subsequently, for the convenience and advantage of his own business, and, for aught that appeared, in his own name and ostensibly on his own account, exchanged this horse for another horse, it was held, that the horse thus substituted became as much a means of false credit, as the other had been, and that, while it thus remained in his possession, it was liable to attachment upon his debts. *Ib.*

See INFANT 1, 2; MORTGAGE 6; SHERIFF'S SALE 1-3.

SCHOOL MASTER, *See PLEADING 7.*

SEAL, *See CORPORATION 10.*

SELECTMEN, *See TOWNS 1, 2.*

SET OFF, *See CHANCERY 34-36.*

SETTLEMENT, *See POOR.*

SHERIFF.

1. The principle, decided in the case of *Kidder v. Barker*, 18 Vt. 454, recognized and affirmed. *Ives v. Strong*, 546.
2. This was an action upon the case against a sheriff, for neglect in not collecting and returning an execution against three debtors, running against the body and property of one of them, and against the property of the other two. The defendant offered to prove, in mitigation of damages, that the debtor, against whose body and property the execution was issued, was, during the entire life of the execution, without the precinct of the officer, in Canada, and that no one of the debtors in the execution had any property, but they were absolutely bankrupt, that there was no *bail* on the original writ, in the action in which the execution issued, and no property attached, and that the plaintiff had not been damaged;—and it was held, that the evidence should have been received, and that, if true, the plaintiff was only entitled to recover nominal damages. *Ib.*
3. It is no defence to an action against a sheriff for not levying and returning

an execution, that it had been agreed between the plaintiff and the execution debtor, that the balance due upon the execution should be charged to the execution debtor upon the books of the plaintiff, and should be adjusted with their other book account, and that this agreement was mutually understood to be in discharge of all other liabilities and remedies, without evidence that the amount had been actually paid, or adjusted, by a settlement of the current account embracing it. *Nye et al., v. Kellam*, 548.

4. Where property, attached upon *mere* process, is sold by the attaching officer, a deputy sheriff, upon the writ, in pursuance of the Revised Statutes, chap. 28, §§ 48-52, and judgment is finally rendered in favor of the defendant, in the action in which the attachment was made, a refusal, on the part of the officer, to pay to the defendant the amount, for which the property was sold, will not render him a trespasser *ab initio*, so as to render him liable in trover for the property. *Abbott v. Kimball et al.*, 551.
5. The only proper action against the deputy, in such case, is for money; and in that action the attaching creditor cannot be joined, unless he has been jointly concerned in the detainer. *Ib.*
6. And if the deputy, in such case, made the sale without notifying the defendant in that action, this would not make the attaching creditor jointly liable with the deputy, in any way, unless he did something more than request a sale. The mere joining with the deputy in a special plea, where they have been sued jointly in trover for the property, when there is also a general several plea upon the record, will not involve the creditor with the officer, nor excuse the court from giving proper instructions to the jury, as to all the points in the case, as to both defendants, *considered separately*, whether particularly requested upon all the points, or not. *Ib.*
7. Trespass on the case, for any mere non-feasance of the deputy, will only lie against the sheriff. *Ib.*
8. An attaching creditor can in no case be held jointly liable with the officer, for any wrong committed by the officer, unless he in some way participated in the wrong, or ratified and confirmed it, after becoming aware of it. *Ib.*
9. Where property has been attached, and final judgment is rendered in favor of the defendant in the suit in which the attachment was made, *trover* will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property attached. *Ib.*
10. In order to sustain an action for an excessive attachment of property upon a writ, the plaintiff must allege and prove much the same, that he would in a suit for a malicious action,—that is, want of probable cause and malice express;—and the attaching creditor will ordinarily be the only person liable to such action. *Ib.*
11. A sheriff, holding an execution for collection, is not obliged to receive the amount of the execution and interest, though tendered to him by the debtor before any levy is made, unless his fees are also offered to him. *KELLOGG, J. Joslyn v. Tracy*, 569.

See TRESPASS 2.

SHERIFF'S SALE.

1. An officer, who acts, in the sale of property upon execution, merely by force of his process, cannot make a sale of such property to himself, and does not, by such attempted sale, acquire even a defeasable title to the property, good against all persons but the debtor and creditor. *Woodbury v. Parker*, 353.
2. It is doubtless true, that the parties conjointly, and perhaps the debtor alone, may authorize an officer, in such case, to become himself the purchaser of the property. *Roxce. J. Ib.*
3. But where there is no offer to prove the assent of the debtor to such purchase by the officer, and the officer did not, after the sale, take and retain the possession of the property, his return upon the execution, showing a sale to himself, is not admissible evidence to show title in him to the property, even as against a mere trespasser, who is a stranger to all title, notwithstanding it appears, by the creditor's receipt upon the execution, that he has received from the officer the full amount at which the property was sold. *Ib.*
4. If an execution debtor consent that his property may be sold upon the execution without advertisement, the sale is valid, and is so far an official sale, that the officer's return upon the execution is *prima facie* evidence in favor of the officer and of those who acted under him. *Burroughs v. Wright et al.*, 510.

See SALE 1; SHERIFF 4-6.

STATUTE.

1. The court will not construe a statute as intended to have a retrospective operation, unless such intention is clearly manifested by the terms of the statute. *Briggs v. Hubbard*, 86.
2. By the Revised Statutes it was provided, that in certain cases a judgment rendered by a justice of the peace might be vacated, on petition to the county court at the first or second stated term after the rendition of the judgment, and the case be proceeded with as though entered by appeal. By the statute of Nov. 1, 1843, the limitation was repealed, and it was provided, that no such petition should be sustained, "unless brought within two years next after the justice's judgment." And it was held, that it was not the intention of the legislature, that the statute of 1843 should be retrospective in its operation, so as to allow a petition to be sustained in a case in which, before the enactment of the statute, the limitation provided in the Revised Statutes had expired. *Ib.*
3. In construing statutes the terms of a proviso may be limited by the general scope of the enacting clause, to avoid repugnancy. *Treasurer of Vt. v. Clark*, 129.
4. The proviso to the statute of Oct. 30, 1844, giving the county court jurisdiction in cases of theft and receiving stolen goods, where the value of the property does not exceed seven dollars, is to be construed as giving jurisdiction of such cases to justices of the peace, if proceedings shall first be commenced before them. *Ib.*

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5. The intention of the legislature in enacting a statute can only be determined by the fair and natural import of its terms, with reference to the subject matter, and without reference to any traditional history of the occasion of its enactment, unless that result from some known state of embarrassment under the former law. *Barker v. Esty et al. & Tr.*, 131.
 6. In the construction of a statute a conjunctive clause may be taken in a disjunctive sense, when it is obvious that such was the intention of the legislature. *Ib.*
 7. That section of the Revised Statutes, [Rev. St. c. 11, sect. 26.] which provides, that "No sheriff, or deputy sheriff, shall be allowed to make any writ, declaration" &c., must be so construed as to include constables, also. The term "sheriff," as used in this section and several others in the same chapter, may be regarded as generic, not a specific, term, comprehending the whole class of executive officers, whose duties are of like nature. *Winchell v. Pond*, 198.
 8. The term "land," as used in the exception to the statute giving jurisdiction to justices of the peace, is sufficiently comprehensive to include a right of way over the real estate of another, whether held by the public, or an individual. *Whitman v. Pownal*, 223.
 9. All statutes in regard to the same subject matter are to be construed together, as parts of one system. *Isham, Ad'mr, v. Bennington Iron Co. et al.*, 230.
 10. Later and more specific statutes, as a general rule, supersede former and more general statutes, so far as the new and more specific provisions go. *Ib.*

See EXECUTION 16, 17.

SUNDAY, See CONTRACT.

SUPREME COURT, See CHANCERY 9-11 ; RECORD 2.

TAXES.

1. Under the statute of Nov. 11, 1807, the collector of a particular land tax must have caused his return of his proceedings to be recorded in the town clerk's office within thirty days after completing his sale, whether the vendue was dissolved on that day, or not. *Taylor v. French*, 49.
2. Where the sale was made August 24, 1829, and the collector then adjourned the vendue to October 5, 1829, and the return showed, that on that day the vendue was opened and was dissolved, the collector finding that all the land had been sold and no mistakes made, and the collector made his return to the town clerk's office October 16, 1829, it was held, that the proceedings were fatally defective. *Ib.*
3. It is also required, under that statute, that the return of the proceedings of the collector should be signed by him. Where the record showed a return of the sale, then a minute of the adjournment of the vendue, and then a minute, that, it being found, at the time to which the vendue was adjourned, that all the land was sold and no mistakes made, the vendue was dissolved, and the collector signed the minutes of adjournment and dissolution only, it was held, that

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- this could not be considered a signing of the anterior proceedings and that the defect was fatal. *Ib.*
4. Where the advertisements of the collector and committee were recorded at length in the town clerk's office, and there was a statement, following the record of each, that the same was inserted in a certain newspaper, giving the title, volume, number and the place where published, but these statements were not signed by any person, but, following the record of all the advertisements, there was a certificate, signed by the town clerk, stating that he had received the foregoing advertisements for record and had recorded the same, it was held, that this certificate could not extend to the statements as to the publication, and did not show, that the town clerk received from the collector the newspapers themselves, in which the advertisements were published, and that the defect was fatal. *Ib.*
 5. If, to a plea of justification under a rate bill and warrant, the plaintiff reply *de injuria &c.*, and no objection is taken to the replication, the defendant must prove every material allegation in his plea. *Downer v. Woodbury*, 329.
 6. Where a collector of taxes justifies the taking of property under his rate bill and warrant, and alleges in his plea, that he gave the bond, required by statute, for the faithful performance of his duty, but does not attempt to set forth the bond, or make proof of it, the fact that he acted as collector is sufficient proof of his having given a bond, to sustain his allegation. *Ib.*
 7. If the collector justify under a warrant for the collection of a state tax, and allege the act of the legislature granting the tax, this allegation need not be specifically proved; for the court will take notice of the general law of the state. *Ib.*
 8. An averment, in a collector's plea of justification, that the taxes in his rate bill "were assessed upon the lists of the persons named for the year 1840," and that the plaintiff and two others "were jointly and legally assessed the sum of \$2,07, being three cents on the dollar of the list of" said plaintiff and others "for the year 1840," is, upon a traverse, a sufficient allegation, that the plaintiff had a list in the town. *Ib.*
 9. But the collector, to sustain his plea, must prove that the plaintiff had a list in the town. The court will not infer this from the fact that the plaintiff's name is in the tax bill; and in this respect there is no difference between a state and town tax. *Ib.*
 10. If the collector called upon the plaintiff for payment of the tax, and the plaintiff refused absolutely to pay it, it was not necessary that the collector should have given time for its payment, and appointed a time and place for receiving it; and evidence of such demand and refusal is sufficient, under a plea which alleges a regular notice of the tax, under the statute, and the appointment, by the collector, of a time and place for receiving payment, and a neglect to pay at that time; and in this case, the tax was against the plaintiff and others jointly, but the plaintiff, alone, was called upon and refused payment. *Ib.*
 11. It being required by the statute, that a collector, who commits a person to

jail for non-payment of a tax, should certify, upon the copy of his warrant left with the jailor, "his doings in relation to the delinquent," it is necessary, that his certificate should contain all the facts requisite to justify him in making the arrest and imprisonment; and it is not competent for the collector, in an action against him for false imprisonment, to supply the omission of these facts in his certificate by parol evidence. *Henry v. Tilson*, 447.

12. A statement by the collector in such certificate, that, "after legally notifying" the delinquent of the time and place when and where he would be to receive the tax, no goods, &c., being shown to him, or found within his precinct, he arrested the body, &c., is not sufficient, to show that he had given the delinquent the six days' notice required by law. *Ib.*
13. Public ministerial officers must set forth, in their returns, the acts done by them, that the court may judge of their sufficiency. *Ib.*
14. If the collector of a tax, after having demanded of a person named in his rate bill the amount of his tax, perform travel for the purpose of distraining property for the payment of such tax, he is entitled to his fees for such travel; and a tender, after such travel is performed, of the amount of the tax and interest is insufficient, if the collector claims his travel fees. *Joslyn v. Tracy*, 569.

See PLEADING 18.

TENANTS IN COMMON.

1. One of two tenants in common of personal property cannot recover against the other, in an action on book account, for having used more than his share of the common property. *McCullis v. Banks et ux*, 442.

TENDER.

1. A tender, made in the absence of the party, to whom, by the terms of the contract, it is required to be made, must be made before the evening of the day on which the contract falls due. And there is no difference, in this respect, between a tender of money and specific articles. *Sweet v. Harding*, 587.
2. A tender of rent, on the day on which the same falls due, made to the lessor, at a late hour in the evening, is a valid tender. *Thomas v. Hayden et al.*, Windsor Co., July Term, 1846, cited by KELLOGG, J. *Ib.*
3. The statute, allowing a defendant, after a suit has been commenced, and until three days before the sitting of the court to which the writ is made returnable, to tender to the plaintiff the amount of his demand and the costs to that time,—Rev. St., c, 106, § 6,—was not intended to extend the right of making a tender to other actions, than those in which a tender might be made at common law; but the object of it was, to allow a tender after action brought,—which, without the statute, could not be made. *Green v. Shurtliff et al.*, 592.
4. At common law a tender may be made in all cases, where the demand is in the nature of a debt, when the sum due is either certain, or capable of

being made certain by mere computation; but it is not allowed, when the action is for unliquidated damages, the amount of which is to be determined by the exercise of discretion by a jury. *Ib.*

5. In *scire facias* upon a recognizance entered into for the prosecution of an appeal, a claim for additional costs depends upon mere matter of computation; and to this claim a tender may be pleaded;—but a claim for intervening damages, which must depend upon the loss the plaintiff may have sustained by the delay, in the failure of the collection of his debt, either in whole, or in part, by the change of circumstances of the debtor, is unliquidated, depending upon the finding of the jury; and to this claim a tender cannot be pleaded. *Ib.*
6. Where the declaration, in such case, includes a claim for additional costs, and also for intervening damages, a plea of tender to the entire declaration is bad on general demurrer;—but, *per HALL, J.*, the defendant might, in such case, have pleaded a tender of the additional costs, and traversed the assignment of the breach for intervening damages. *Ib.*

TOWNS.

1. Under the Revised Statutes the selectmen of a town have power to submit to arbitration any such claims against the town, as they are, by the statute, authorized to audit and adjust; and the town will be bound by an award made in pursuance of such submission. *Dix v. Dummerston*, 262.
2. In this case a claim was preferred against a town for building a bridge, and the selectmen of the town agreed with the claimant, by writing under seal, to submit the matter to arbitration; and it was held, that the town was bound by the award made in pursuance of such submission. *Ib.*

See DEED 1-4; POOR 2.

TRESPAS.

1. When the original act of an officer, in the execution of civil process, is unlawful, those aiding him in the performance of it will be trespassers, though they act by his command. *Hooker v. Smith et al.*, 152.
2. In this case a sheriff arrested a debtor on execution, by breaking open the outer door of the defendant's dwelling house; and it was held, that those who aided the sheriff in so doing were trespassers, though they acted by his command. *Ib.*
3. In the ordinary case of carrying on a farm at the halves, the owner of the farm is not so far divested of the possession, that he may not maintain trespass, in his own name, for any injury to the inheritance. As to the growing crops, in which the parties have a joint interest, they should join in the action. But where the tenant, in such case, disclaimed all occupancy of a portion of the land, in reference to which a controversy existed between the owner of the land and a third person, and refused to take possession of it, it was held, that the owner of the land might sue, in his own name, for an injury to the crops upon such portion. *Cutting v. Cox*, 517.

4. A party having the legal title to land, having entered, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards; and in such action he may recover all damages intervening between the time of disseizin and re-entry, together with damages for a subsequent entry by the defendant. *Ib.*
5. The entry upon the land, by the owner, and measuring the lines, and asserting upon the land his claim of title, and directing his agent to cut the grass thereon, with notice of all this to the disseisor, constitutes a sufficient re-entry by the owner, to enable him to recover damages, in an action of trespass, for the value of the grass which the disseisor subsequently cut upon the land. *Ib.*
6. Under a declaration in ejectment, in the statute form, which charges the defendant with having taken the whole profits of the premises to himself during the time laid in the declaration, the plaintiff cannot, with a view to increase his claim for *mesne* profits, give evidence of such acts of trespass, as arose from the wanton misconduct of the defendant, and which injured the intrinsic value of the premises, without any benefit resulting therefrom to the defendant; and consequently a judgment in favor of the plaintiff, in an action of ejectment, is no bar to a subsequent action of trespass for such wanton acts of the defendant, though committed by him while the action of ejectment was still pending. *Walker v. Hitchcock*, 634.
7. In actions of trespass to real, as well as personal property, matters in discharge of the action must be specially pleaded; and although the matter, which the defendant claims should operate as a bar to the action, may be given in evidence by the plaintiff, still the defendant cannot take advantage of it, as a bar, under the general issue. *BENNETT, J.* *Ib.*

See DEED 2; EXECUTION 13; PLEADING 2-7, 18; SHERIFF 4, 8.

TRESPASS ON THE CASE, *See ACTION ON THE CASE.*

TROVER.

1. A delivered to B. certain property, consisting of stock for clock making, watches, watch materials, jewelry, &c., under an agreement in writing, by the terms of which it was stipulated, that B. should manufacture, repair and put in order the property, and that he might sell it, or exchange it for certain other descriptions of property specified, and that A. would take back all the property if requested after three years from the date of the contract, and before, if the parties could agree, or that, if A. should request, the whole property should be his at all times, and that, if B. should exchange the property for any description of property not authorized by the agreement, or should use any of the property, he should charge such property to himself and become responsible to pay for the same; and B. expressly agreed, that he would manufacture, repair and dispose of the property, as stipulated, and that, "having received pay for so doing, all the profit" should belong, together with the property, to A.; and it appeared, that B. received property under the contract, and that he was working and trading with the same, and that, while he was so doing, the property was

attached by the defendant, as belonging to B., at the suit of a creditor of B.: And it was held, that A. had not so parted with his right to the immediate possession of the property, as to preclude him from sustaining an action of trover against the defendant therefor. *Batchelder v. Warren*, 371.

- 2. Where property has been attached, and final judgment is rendered in favor of the defendant in the suit in which the attachment was made, trover will not lie against the attaching officer, a deputy sheriff, for neglect, in not keeping and taking suitable care of the property attached. *Abbott v. Kimball et al.*, 551.

See Book Account 11; DEED 16; SHERIFF 4, 6, 8.

TRUSTEE PROCESS.

1. Where it appeared, that one summoned as trustee had executed to the principal debtor a negotiable promissory note, and that the note, before it became due, and before the service of the trustee process upon the trustee, had been, for a valuable consideration, indorsed and transferred by the principal debtor to one who now appeared as claimant in the case, and that before the trustee received notice of the indorsement, service of the trustee process was made upon him, in his absence from the state, by leaving a copy at his house, and after this, but before the trustee had notice of the service, the indorsee gave notice to the trustee of the indorsement, it was held, that, under the statute of 1841, the plaintiff in the trustee process would hold the amount due from the trustee upon the note. *Barney v. Douglass & Tr.*, 98.
2. And it was also held, that a promise, made by the trustee at the time he received notice of the indorsement, and before he had notice of the service of the trustee process, to pay the note to the indorsee, not being made on any new consideration, did not change the rights of the parties, and would not entitle the trustee to be discharged, under the fifth section of chapter 29 of the Revised Statutes. *Ib.*
3. The statutes of this State, relating to trustee process, do not extend to any other class of debts, or demands, than such as are the ordinary result of contract, either express or implied, creating a fiduciary relation. *Barker v. Esty et al. & Tr.*, 131.
4. Under the Revised Statutes of this state one cannot be held as trustee for money received by him from the principal debtor as usurious interest. It is not a "credit intrusted" to the lender by the borrower, within the meaning of the statute; but the remedy for money so paid is rather a statutory redress for a virtual wrong, and, as such, a part of the administration of the corrective police of the country. *Ib.*
5. If a trustee has been held chargeable in the court below, and this court find the judgment erroneous, as the law then stood, the liability of the trustee may be examined, as affected by any change in the law subsequent to the hearing in the court below. *Ib.*

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6. The statute of Nov. 5, 1845, extending section four of chapter twenty nine of the Revised Statutes to whatever a trustee holds "against law and equity," cannot be so construed, as to render a person chargeable as trustee for money received by him from the principal debtor as usurious interest. The true construction of that statute is, that it so extends the construction of the section named, as to render a person chargeable, as trustee, for whatever, of the nature specified in that section, belonging to the principal debtor, he holds against law, or equity. *Ib.*
 7. Whether a transfer of property from the principal debtor to the trustee was fraudulent, to defeat the rights of creditors, is a matter of fact, which should be found by the county court. *Fish v. Field & Tr.*, 141.
 8. Where it appeared from the disclosure of the trustee, that the property of the principal debtor had been attached on a debt for \$1000, and that thereupon the principal debtor agreed with the trustee, that, if he would pay that debt, he would execute to the trustee a note for \$1200, payable on demand, and would confess judgment thereon and allow him to levy and collect the same forthwith, and it appeared that this was done and the trustee collected the whole amount of the \$1200 note, it was held, that he was not chargeable, under the statute, as the trustee of the principal debtor, for the \$200 received by him above the sum paid out. *Ib.*
 9. The indebtedness evidenced by a bond, given to indemnify an officer for having attached property of doubtful ownership, may be attached, by trustee process, as the property of the officer, after judgment has been recovered against the officer by a third person for taking the property. *Downer v. Topliff & Tr.*, 399.
 10. A debt, which is certain as to the liability, and uncertain only as to the amount, is not contingent, within the meaning of the statute, but may be taken by trustee process. *Ib.*
 11. A disclosure of one summoned as trustee cannot ordinarily be treated as evidence against another person, who is also summoned as trustee in the same suit. Disclosures of trustees are analogous, in this respect, to answers in chancery. *Ib.*
 12. Where a bond, given to indemnify an officer for having attached property of doubtful ownership, was signed by one person as principal and by another as surety, and judgment had been recovered against the officer for taking the property, and the signers of the bond were summoned as trustees of the officer, in a suit against him, it was held, that notice of the assignment of the bond by the officer to a third person, given by the assignee, before the service of the trustee process, to the person who signed the bond as surety, without proof of notice to the principal in the bond, was not sufficient, to entitle the assignee to hold the amount due upon the bond, as claimant in the trustee suit. *Ib.*
 13. Where it appeared from the disclosure of a trustee, that he had in his possession certain military accoutrements, belonging to the principal debtor, who was adjutant of the regiment, and that the principal debtor had some time previously

absconded from the state, it was held, that he had ceased to be an officer, in consequence of his removal from the state, and that he was no longer under obligation to furnish these military accoutrements, and that consequently the statute exemption, as to him, had ceased, and that the trustee should be helden chargeable for the articles. *Owen v. Gray & Tr.*, 543.

14. A trustee, who excepts to the decision of the county court charging him as trustee, and brings the case into this court, and does not prevail upon his exceptions, either in whole, or in part, will not be allowed to retain, out of the funds in his hands, his costs in this court;—neither will he be required to pay the costs of the opposite party in this court. *Brown v. Davis & Tr.*, 603.
15. Where one summoned as trustee had, previous to the service of the trustee process upon him, signed a promissory note as co-surety with the principal defendant, and paid the note after the trustee process was served upon him, it was held, that he was entitled to deduct from the funds in his hands one half of the amount so paid,—being the amount for which he was entitled to call upon the principal defendant for contribution as co-surety. *Strong et al. v. Mitchell & Tr.*, 644.
16. But he was not allowed to deduct from the funds in his hands the amount of a note, due from the principal defendant to a third person, which he had promised to pay for the principal defendant prior to the service of the trustee process, but which promise was void by the statute of frauds. *Ib.*

See Process 4.

TRUSTS AND TRUSTEE.

1. The husband is competent to act as trustee of his wife's separate property as well as any other person, if duly appointed; and he will sometimes be regarded as such, with a view to the protection of the wife's separate property against his creditors, without any appointment whatever. *Porter et al. v. Bank of Rutland et al.*, 410.
2. By our law an express trust, except in lands, may be created without writing. No prescribed form of words is necessary, to create it. The intention of the party making it affords the only sure test of its creation; and, in ascertaining this intention, the language is not to be tortured by any technical constructions, but, as in the case of wills and devises, a liberal construction is to be adopted. *Ib.*
3. In designating a trustee to take charge of the fund, no greater certainty, or formality, is requisite, than in the creation of the fund itself; and, indeed, it is not necessary, in order to sustain a trust in equity, that a trustee should have been designated in the instrument creating the trust fund, or by any simultaneous or subsequent instrument. *Ib.*
4. Where it appeared, that the father of a married woman intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and he subsequently enclosed in a letter to her husband, a

check for \$1000, payable to his daughter, or bearer, and expressed in the letter a wish that the money might be so invested as would be for the mutual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them, and it appeared that she then had three children, the court considered the evidence sufficient to justify them in finding, that the intention of the father was, to set apart this fund for the exclusive benefit of his daughter and her children, and to place it under the control of her husband, as her trustee. *Ib.*

5. Property, purchased by a trustee with the trust funds, and held by him in his own name, is not subject to attachment and sale by his creditors, unless they are *bona fide* creditors without notice of the trust. *Ib.*
6. *Quare.* Whether notice of the trust, received by the attaching creditors subsequent to the attachment, but before levy, should affect their rights acquired by the attachment, if they had no notice of the trust at the time the attachment was made? *Ib.*
7. Notice to the president of a banking corporation, that stock, standing upon the books of the bank in the name of one person, is held by him in trust for another, should be considered as notice to the corporation. And it is not necessary, in order to affect the corporation with notice of such trust, that there should have been a full communication of all the circumstances connected with it. It is enough, in such case, if the party be put upon inquiry. *Ib.*

See Chancery 23, 25.

USURY, *See Assumpsit 2; Chancery 40, 41, 44; Trustee Process 4, 6.*

VARIANCE, *See Criminal Law 5, 6; Promissory Notes 6.*

VENDUE, *See Taxes.*

VERMONT CENTRAL RAIL ROAD CO.

1. The provision in the charter of the Vermont Central Rail Road Company, which authorizes a person, whose land has been taken for the use of the Company, and who feels aggrieved by the appraisal of the damages by the commissioners appointed in pursuance of the charter, to appeal to the county court, and which provides that the decision of the county court shall be final in the matter, does not entitle the person thus appealing to have his damages assessed in the county court by a jury. *Gold v. Vt Central Rail Road Co., 478.*
2. The term "Court" may be construed to mean the *judges* of the court, or to include the *judges and jury*, according to the connection and the object of its use. Resort must be had, for the purpose of determining the form of trial, where there is no express legislative provision, other than the use of the general term, to the nature of the question submitted to the court, and the mode, heretofore in use, of determining similar questions. *Ib.*

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3. In cases analogous to those where land has been taken by a rail road corporation, pursuant to the provisions of their charter, it has never been the practice in this state, where the matter has been pending in the county court, to assess the damages by a jury,—but by commissioners, or perhaps by the judges of the court. *Ib.*
 4. The statute of Nov. 2, 1846, which provides, that, when it becomes necessary to assess damages, *and no other provisions are made by law* for such assessment, the same shall be assessed by a jury upon the request of either party, does not entitle a person, whose land has been taken by the Vermont Central Rail Road Company, and who has appealed from the appraisal of his damages by the commissioners appointed under the charter, to have his damages assessed by a jury in the county court;—since the general terms used in the charter of the company must be construed to have provided, that the damages, in such cases, should be assessed in the mode usual in this State in analogous cases, which is by the appointment of commissioners by the county court, or perhaps by the judges of the court,—but never by a jury. *Ib.*

WARRA TY, *See* CONTRACT 4, 5, 8, 9, 19; INFANT 1, 2.

WITNESS, *See* EVIDENCE.

Ex G. A. A.

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